No. 981 341

Supreme Court of the United States

OCTOBER TERM, 1920.

HENRY S. DE REES,

Petitioner,

against

DAVID COSTAGUTA, MARCOS A. ALGIERS, ALEJANDRO SASSOLI, EUGENIO OTTOLENGHI, individually and as co-partners in business composing the co-partnership of David Costaguta & Company, Renado Taffell and the American-European Trading Corporation.

Appeal from Decrees of the District Court of United States for the Southern District of New York.

MEMORANDUM IN OPPOSITION TO MOTION TO ADVANCE

Stillman Appellate Printing Company, 200 William Street, N. Y. C.

No.

SUPREME COURT OF THE UNITED STATES,

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DAVID COSTAGUTA, MARCOS A. ALGIERS, ALEJANDRO SASSOLI, EUGENIO OTTOLENGHI, individually and as co-partners in business composing the co-partnership of David Costaguta & Company, RENADO TAFFELL and the AMERICAN-EUROPEAN TRADING CORPORATION.

APPEAL FROM DECREES OF THE DISTRICT COURT OF UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MEMORANDUM IN OPPOSITION TO MOTION TO ADVANCE.

The Notice of Motion states that the petitioner moves for an order "directing that the above entitled cause be advanced for hearing upon the docket of this Court, pursuant to the provisions of Rule 32, upon the ground that the only question at issue is the question of the jurisdiction of the District Court of the United States for the Southern District of New York."

The respondents, David Costaguta, Marcos A. Algiers, Alejandro Sassoli, Eugenio Ottolenghi, individually and as co-partners in business composing the co-partnership of David Costaguta & Company, (who have appeared specially herein as appears in and by their notice of special appearance and supplemental notice of special appearance to be found on Page 116 to 120 in the Transcript of Record), wish to have an opportunity to argue orally before this Court, the questions presented on this appeal, and accordingly oppose this motion to advance the hearing of this appeal under Rule 32 of this Court.

The bill of complaint prays for a decree for the dissolution of an alleged partnership claimed by the plaintiff to exist between himself and David Costaguta, Marcos A. Algiers, Alejandro Sassoli, Eugenio Ottolenghi individually and as co-partners in business composing the co-partnership of David Costaguta & Company, and for an accounting of the business transacted by such alleged partnership. Whether there was such a partnership depends upon the construction of a certain written contract entered into between the parties and the legal effect to be given to certain provisions thereof and will require extended argument.

Furthermore, the District Judge has certified that the decrees dismissing the bill of complaint "were entered solely because the case as made by the bill did not set forth a legal or equitable claim to or lien on the property in the district, of which this Court would have jurisdiction within the meaning of Section 57 of the Judicial Code, or in which this Court could render a judgment other-

wise than a judgment in personam against the non-resident aliens who appeared specially and objected to the jurisdiction of the Court." Whether the bill of complaint sets forth a "legal or equitable claim to or lien on property in the District," so as to meet the requirements of Section 57 of the Judicial Code, presents many questions, which in the opinion of counsel for respondents, cannot be properly argued within the period of a half hour allotted to each side, if placed on the Summary Docket, assuming that this appeal is one which, under the rules of this Court, can be advanced to Summary Docket, which respondents doubt. Moreover, this appeal involves a peculiarly private controversy relating to a peculiarly private and special contract and presents no question of general interest.

CONCLUSION

The Motion to advance the hearing of this appeal under Rule 32 or to place the same on the Summary Docket should be denied.

Dated, New York, May 14, 1920.

Respectfully submitted,

WALTER H. MERRITT, ESQ.,
Counsel for Respondents, Appearing Specially for David Costaguta, Marcos A. Algiers, Alejandro Sassoli, Eugenio Ottolenghi, individually and as co-partners in business composing the co-partnership of David Costaguta & Company, in opposition.

Supreme Court of the United States

October Term, 1970

No. 841

HENRY S. DE REES,

Plaintiff-Appellant,

against

DAVID COSTAGUTA, MARCOS A. ALGUERA, ALEJANDRO SASSOLI, EUGENIO OTTOLENGHI, individually and as co-partners in business, composing the co-partnership of David Costagueta & Company; RENATO TAFFELL and the AMERICAN-EUROPEAN TRADING CORPORATION,

Defendants-Appellees.

BRIEF OF SOLICITORS FOR PLAINTIFF-APPELLANT.

ERWIN, FRIED & OZAKI,
Solicitors for Appellant.

MARON ERWIN,
FREDERICK M. OZAKI,
of Counsel.

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SUBJECT INDEX.

TABLE OF CASES.

Supreme Court of the United States

OCTOBER TERM, 1920—No. 931.

HENRY S. DE REES,
Plaintiff-Appellant,

against

DAVID COSTAGUTA, MARCUS A. ALGIERS, ALEJANDRO SASSOLI, EUGENIO OTTOLENGHI, individually and as co-partners in business, composing the co-partnership of David Costaguta & Company; RENADO TAFFELL and the AMERICAN-EUROPEAN TRADING CORPORATION,
Defendants-Appellees.

BRIEF OF SOLICITORS FOR PLAINTIFF-APPELLANT.

This is an appeal from the District Court of the United States for the Southern District of New York under Section 238 of the Judicial Code, and we think the power of this Court to review the decrees appealed from (Rec., pp. 241-244) exists under said section as well on the constitutional question made as to the power of the Court

exercised in dismissing the bill for want of jurisdiction, in the manner and form in which it was done, as on the jurisdictional question made and certified, and that the powers of this Court, on review, are plenary.

Statement of the Case.

AVERMENTS OF THE BILL AS TO GENERAL JURISDICTION.

The bill in equity in this cause was filed in the Clerk's Office of the District Court of the United States for the Southern District of New York on March 10, 1920, by the plaintiff, averring himself to be a citizen and resident of the State of New Jersey, against David Costaguta and Alejandro Sassoli, averred to be citizens and subjects of the Kingdom of Italy and residents of the Republic of Argentine, and against Eugenio Ottolenghi, averred to be a citizen of the Republic of Argentine and a resident of the City of Buenos Aires in the Republic of Argentine, and against Marcos A. Algiers, averred to be a citizen of the Republic of France and a resident of the City of Buenos Aires in the Republic of Argentine, and against Renado Taffell, averred to be a citizen of the Kingdom of Great Britain and Ireland and a resident of the City of New York in the Southern District of New York, and against the American-European Trading Corporation, averred to be a corporation organized under the laws of the State of New York and having its office for the transaction of its business in the City of New York in said Southern District of New York (Rec., pp. 2-3).

JURISDICTIONAL AVERMENTS OF THE BILL AS TO SUBJECT-MATTER.

As set forth in the bill (Rec., p. 5), a contract (Translation, Rec., p. 82) was entered into at Buenos Aires on November 1, 1917, between the plaintiff and the defendants David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi, as partners then constituting the firm of David Costaguta & Company, whereby a co-partnership was formed between the said four parties in the ownership and conduct of a business in the buying and selling of hosiery, to be organized under the designation of "Hosiery Section" of David Costaguta & Company, to be carried on in the City of Buenos Aires and elsewhere. The new partnership so formed took over the assets and liabilities then existing of a previous and somewhat similar business previously done by the plaintiff and two of the members of the firm of David Costaguta & Company, in which plaintiff had a large, at that time, unsettled interest (Rec., p. 4). Shortly after the execution of the contract for said hosiery section, designated in the bill for brevity as the co-partnership, the plaintiff on November 20, 1917, on the business of the co-partnership, left Buenos Aires (Rec., p. 12) for New York, where he established in the City of New York (Rec., p. 12) a place of business of the said co-partnership for purchasing and selling its merchandise, and a large business was so done there and in Buenos Aires by said co-partnership, as well in selling merchandise directly to customers in New York, and in various countries of South America, as in the purchasing of merchandise transshipped from New York to be sold by said co-partnership at or from its place of business in Buenos Aires.

Thereafter disagreements arose (Rec., p. 15) between the plaintiff on the one side and the other

members of the co-partnership, who constituted the firm of David Costaguta & Company, because of which on August 22, 1919, plaintiff gave notice in writing (Rec., p. 17), in accordance with a provision of the co-partnership contract, that plaintiff elected to terminate said contract of co-partnership, to take effect November 22, 1919. That on September 19, 1919, the said David Costaguta & Company acknowledged receipt of said notice and accepted the termination of said contract to take effect on November 22, 1919. That thereafter, on November 10, 1919, plaintiff, as provided in said contract, gave to said David Costaguta a formal written notice (Rec., p. 19) that he elected to and did demand a complete liquidation of the co-partnership under the provisions of said contract providing for complete liquidation on said demand, to which complete liquidation David Costaguta agreed (Rec., p. 17) in writing, and the liquidation was entered upon on November 22, 1919.

The bill alleges the failure and refusal (Rec., pp. 16, 17) of David Costaguta & Company to give to the plaintiff the complete periodical accounting provided for in the contract, they, under the contract of co-partnership, being in charge at Buenos Aires of the principal books of account, and their failure to render any statement of account of the business done after the business year of 1918, which terminated October 31, 1918.

The bill alleges that David Costaguta & Company, by its representatives sent to New York (Rec., pp. 15, 16, 17), one of whom was the defendant Eugenio Ottolenghi (Rec., p. 19), a co-partner in the said hosiery section, attempted to and did interfere with and largely superseded the plaintiff in the conduct of the affairs of said co-partnership.

That (Rec., p. 18) on or about November 22, 1919, there remained and was on hand and unsold in the

City of New York in the Southern District of New York merchandise belonging to said co-partnership of the value of about $100,000, which was in the premises occupied by said co-partnership at No. 22 White Street in said city and district, and various warehouses in said city and district in the name and in the possession of said David Costaguta & Company, holding the same for said co-partnership, and which the plaintiff attempted to sell and liquidate for the best interest of said co-partnership, but that said David Costaguta & Company refused to permit the plaintiff to sell to the best advantage, but that said David Costaguta endeavored to sell and did sell large quantities thereof at a sacrifice, at a loss and below market value.

That during the period from November 22, 1919, and February 20, 1920, the funds of said co-partnership in the City of New York (Rec., p. 19) were commingled with the private funds of said David Costaguta & Company and deposited in the name of said David Costaguta & Company in certain mentioned banks in New York City and in New Jersey.

That during said period the said David Costaguta & Company had (Rec., p. 19) title, possession, custody and control in the City of New York, Southern District of New York, among other things, of a large amount of merchandise and other assets which were purchased and acquired by said David Costaguta & Company with the commingled funds belonging to the said David Costaguta & Company and said co-partnership.

That in or about the month of January, 1920 (Rec., p. 20), the said David Costaguta & Company, for the purpose of defrauding the plaintiff and intending thereby to thwart him in the ascertainment of his just rights and remedies, and to prevent him from receiving and collecting from the

property of said co-partnership the moneys justly due to him, conceived the scheme and design of organizing a corporation under the laws of the State of New York, to which it would transfer and convey all the property, assets and effects of said co-partnership, and all of the property, assets and effects of the said David Costaguta & Company held in the City of New York aforesaid. That in pursuance of said fraudulent scheme the said David Costaguta & Company (Rec., p. 21) on or about January 31, 1920, caused to be incorporated and organized the defendant the American-European Trading Corporation under the laws of New York, with an authorized capital of $10,000, divided into shares of $100 each, with dummy incorporators and dummy directors named in the certificate of incorporation, who were not required to be stockholders, and that all of the stock of the said corporation is owned and held by the said David Costaguta & Company, to whom it was issued in alleged consideration of the transfers to it thereinafter mentioned.

That immediately after the organization of said corporation (Rec., p. 22), in furtherance of said fraudulent scheme, on or about February 1, 1920, and thereafter, without the consent of the plaintiff, the said David Costaguta & Company transferred, conveyed and set over to the said corporation all of the merchandise, property, money accounts, choses in action and other assets of the co-partnership, as well as all of the merchandise, property, money accounts, choses in action and other assets belonging to the said David Costaguta & Company. That said transfers were made in bulk, not in the usual course of trade in liquidation of the co-partnership assets, without any actual consideration paid therefor otherwise than the issuance by said corporation of all its capital stock to said David Costaguta & Company.

That said David Costaguta & Company closed and discontinued (Rec., p. 23) all of its said bank accounts and the large sums of money so withdrawn were deposited in part to the credit of said defendant corporation and in part in the name of the defendant Renado Taffell, who since said transfer has been disbursing the same in his individual name for the benefit and account of said defendant corporation and the said David Costaguta & Company.

That there is now in the possession, custody and control of said defendant corporation in the Southern District of New York (Rec., p. 23) twenty-two cases of hosiery of the value of about $15,000, the property of the said co-partnership, all the accounts outstanding due to the co-partnership on the sale of hosiery aggregating many thousand dollars; 9091 hides of the value of about $150,000, acquired by the said David Costaguta & Company with the commingled funds of the co-partnership, besides other property. That in addition there was other property of said co-partnership transferred to said corporation by said David Costaguta & Company, consisting of contracts for the purchase of merchandise and claims against various business concerns for breaches of contract of sale, which are specified in the bill, aggregating many thousand dollars.

Besides the property held by the defendants in the Southern District of New York, it is averred in the bill that, becoming cognizant of the scheme so formed of said David Costaguta & Company to so transfer the assets of said co-partnership and place the same in hands where he would be deprived of his rights therein (Rec., pp. 20-21), the plaintiff held possession of sixty-five cases of hosiery which had been billed to a customer on negotiations for sales which fell through and were not consummated; of which plaintiff sold thirty-two

cases for $20,840.25, which included a profit of $5,000, and plaintiff still holds in the district thirty-three cases unsold, all of which the plaintiff holds for the benefit of the co-partnership subject to the accounting herein.

It is further averred (Rec., p. 25):

> "And the plaintiff charges that all of the property, assets, money and effects now held by the defendants and each of them, and particularly the capital stock of the defendant, the American-European Trading Corporation, held by and in the name of the defendants, composing the partnership of David Costaguta & Company, the situs of which is in the City of New York, in the Southern District of New York, is charged with a trust and subject to the claim and lien of the plaintiff, and the plaintiff further charges that the defendants and each of them took said property charged with a trust in favor of the plaintiff and hold the same with knowledge and notice of the co-partnership lien and claim of the plaintiff and with knowledge and notice of the fact that said property was transferred with the preconceived intent and design upon the part of the said David Costaguta & Company to hinder, delay and defraud the plaintiff and to impede him in the enforcement of his legal and equitable rights and remedies."

The prayers of the bill were for the appointment of a receiver to take charge of the assets of the co-partnership in the district and the property into which the assets of the co-partnership had gone and been commingled in the hands of the defendants and their agents and take hold and administer the same and to liquidate the affairs of the co-partnership;

For restraining orders *pendente lite* against the defendants and their agents from disposing of said

properties or removing same from the jurisdiction of the Court;

For a decree declaring that the said co-partnership had been dissolved and directing its liquidation;

For an accounting to plaintiff by the said Costaguta, Algiers, Sassoli and Ottolenghi, composing the firm of David Costaguta & Company;

For a decree declaring that the plaintiff has a lien upon all said co-partnership property and property with which the same has been commingled or traced in the hands of the defendants and those taking with notice;

For issue of the usual equity subpoena directed to the defendants, and general relief; and

> "The plaintiff further prays that in respect of such of the defendants as are not found in the District, the Court will make an order setting forth that the plaintiff is claiming an interest in and lien upon property, the situs of which is now in this District and require such defendant as may not thus be found in this District, to demur, plead or answer to this Bill at a day therein to be named, in accordance with the statute in such case made and provided."

From the foregoing it will be seen that the suit is one in the District Court of the United States for the Southern District of New York by a citizen of New Jersey to enforce his partnership lien upon property within the district against his four alien co-partners, who are non-residents of the United States (and who the subsequent proceedings show were not found by the Marshal for service within the district), and against two other defendants (who were served in the district), one of whom (Taffell) is a resident alien, alleged to be acting as an agent for the defendant co-partners and hold-

ing moneys of the co-partnership, and the other, the American-European Trading Corporation, a corporation of New York, organized by said other defendant co-partners since the co-partnership went into liquidation, and of which they own all the stock, and to which they have transferred without plaintiff's consent, a large part of the assets of the co-partnership without consideration and not in the usual course of trade in liquidation and which took and holds the assets with notice of plaintiff's lien and rights.

It is to be noted that the contract of co-partnership of November 1, 1917, between the plaintiff and the members of the firm of David Costaguta & Company was written in Spanish, and a copy of it was not attached to the bill of complaint, but the provisions of the contract, clause by clause, in substance was set forth in English in the bill.

Simultaneously with the filing of the bill plaintiff filed an affidavit made by the plaintiff in support of the motion for orders for interlocutory relief prayed. To this affidavit was appended a copy of the contract, written in Spanish (Rec., p. 78), and a literal translation of it (Rec., p. 82) was agreed upon as correct by counsel for all parties (Rec., p. 270). The contract is not disputed. A correct decision of the questions involved largely turns upon that contract.

We conceive that the plaintiff is bound by the terms of the contract as set out in the said translation in matters, if any, in which there is a conflict between the written translation and the allegations of the bill as to the substance of the contract in any particular (we know of no such conflict). On the other hand, in all particulars, if any, in which said written literal translation may be ambiguous, leaving it open for the introduction of other testimony to explain or show a construction

by the acts of the parties under it, that in those particulars the construction averred in the bill will, on the determination by this Court of the correctness of the action of the Court below in dismissal of the bill on the construction of the contract for want of jurisdiction, prevail over any counter-affidavits or opinion of the lower Court on such construction. And this because the dismissal of the bill on special appearance precluded the plaintiff from all testimony under examination and cross-examination and has deprived plaintiff of his day in court on all such matters averred in the bill subject to be established by additional proofs.

As to Subpoena—the Temporary Restraining Orders and Rules to Show Cause and Service of Process.

Equity subpoena was duly issued, directed to the several defendants on March 10, 1920 (Rec., p. 33), and served by the Marshal on the same day upon the resident defendants Renado Taffell and the American-European Trading Corporation found within the district (Rec., pp. 35-36), and on the same day the Marshal served the subpoena on Leon Grumet, alleged in the Marshal's return to be an agent of the defendants David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi as for service upon said non-residents (Rec., p. 36). Plaintiff has never insisted that that particular return showed any legal service upon the said non-residents. On March 11, 1920, the Marshal entered his return on the subpoena as follows:

> "I hereby certify, that after diligent search, I am unable to find the within named David Costaguta, Marcos A. Algiers, Alejandro Sassoli or Eugenio Ottolenghi in my District" (Rec., p. 34).

On March 16, 1920, on affidavit verified by plaintiff's attorney on March 15, 1920, setting forth the fact that the Marshal had entered his return on the subpoena, that he was unable to find the said non-resident aliens above named within the district, plaintiff moved the Court for an order for service upon them by publication against them under the provisions of Section 57 of the Judicial Code (Rec., p. 107). On March 16, 1920, in the said District Court, his Honor, Judge Learned Hand, on the said affidavit, the bill of complaint and Marshal's return, entered an order in accordance with Section 57 of the Judicial Code for service by publication upon said non-resident defendants, reciting, among other things, "it appears that the above-entitled action is brought to enforce an equitable lien upon or claim to title to personal property within this district, and that the defendants David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi and each of them are not now inhabitants of and cannot be found within the Southern District of New York, and that the said defendants and each of them reside in the City of Buenos Aires, Argentine Republic," and it was therein ordered that the said defendants, "appear, plead, answer or demur to the bill of complaint herein on or before the 28th day of April, 1920."

And the order further provided for its publication in the *New York Evening Post* in the issue of that newspaper of March 17, 24 and 31 and April 7, 14 and 21, 1920, and otherwise provided for service of copies of the order upon persons in possession of the property in the district as directed in the statute (Rec., p. 112). Service of the order was made by the Marshal as directed (Rec., p. 115) and its publication was proceeding as directed at the time of the dismissal of the bill and the vacating of the order as hereinafter mentioned on April 10, 1920.

On the filing of the bill and moving affidavit of the plaintiff on March 10, 1920, his Honor, Judge Hand, granted a rule *nisi* directed to each of the defendants requiring them to show cause before said District Court on March 20, or as soon thereafter as counsel could be heard, why a receiver *pendente lite* should not be appointed of the property of said co-partnership, &c., as prayed, and granting a restraining order as prayed pending the hearing on the rule *nisi*, and directing that a copy of the bill and the order be served upon such of the defendants as may be found within the district (Rec., p. 37).

The Marshal made his returns showing that on March 11, 1920, he had made service of the said rule *nisi*, or order to show cause, in his district upon the defendants Renado Taffell and the American-European Trading Corporation and upon Leon Grumet as agent and attorney in fact of the non-resident defendants on March 10, 1920 (Rec., pp. 105 106).

Special Appearances.

On March 19, 1920, Esselstyn & Haughwout, attorneys for said Taffell and American-European Trading Corporation, entered their special appearances for said defendants for the purpose of opposing the motion made upon said order to show cause, and not otherwise (Rec., p. 116).

On March 23, 1920, Walter H. Merritt, attorney for David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi, composing the partnership of David Costaguta & Company, entered his special appearance for said defendants solely for the purpose of applying to the Court for an order (1) setting aside the service of subpoena by the Marshal on March 10, 1920, as to them; (2) for an order vacating the order for service

on them by publication made on March 16, 1920 (Rec., p. 352).

On the same day, March 23, 1920, the said Walter H. Merritt, as attorney for the said non-resident parties, obtained from the said District Judge an order to show cause, returnable on March 26, 1920, (1) why the Marshal's return (Rec., p. 36) of service of the subpoena on March 10, 1920, on the said non-resident defendants by serving Leon Grumet, their agent, should not be vacated and declared annulled on the ground that the defendants were not found within the district and could not be so served legally with subpoena, and (2) why the order for service by publication on said defendants and requiring them to plead, answer or demur, made by Judge Hand on March 16, 1920, should not be vacated, on the ground that the action was not an action "to enforce any legal or equitable lien upon or claim to, or to remove any encumbrance or lien or cloud upon the title to real or personal property" within the Southern District of New York, and the Court was without jurisdiction to make such order, and could give no judgment except *in personam* against the said defendants, of whom it lacked personal jurisdiction (Rec., p. 124).

Attached to said rule *nisi* was an affidavit of Leon Grumet, stating in substance that his agency for said David Costaguta & Company was so limited in his power of attorney as not to authorize his receiving service for them (Rec., p. 129).

The Hearing Before Judge Hand in the District Court.

The hearing on the several motions to show cause and motions made by the respective parties, as hereinbefore stated, came on to be heard before Judge Hand in said District Court and

all questions made by the respective parties were heard together. In addition to the bill of complaint and moving affidavits, the several orders of Court made on the different motions of the respective parties, as hereinbefore mentioned, and Marshal's returns, and appearances, the following papers and documents were offered by the respective parties and received by the Court:

On behalf of the defendant the American-European Trading Corporation and Renado Taffell:

(1) The affidavit of Leon Grumet, president of the said corporation since its organization in February, 1920, with exhibits, in the nature of an answer on the merits to the averments of the bill (Rec., p. 133).

(2) The affidavit of Manuel Garza-Eldape, an attorney of the Republic of Mexico, resident of New York, who undertakes therein to testify as to what the law of Argentine is as to the construction of the copy in Spanish of the contract of November 1, 1917, between the plaintiff and David Costaguta & Company (Rec., p. 162).

(3) The affidavit of Arthur Manly (Rec., p. 165) as to the English translation of the said contract of November 1, 1920, Exhibit B (Rec., p. 82), which is stipulated by all parties to be a correct literal translation (Rec., p. 270).

And on behalf of the plaintiff, in addition to the bill of complaint and moving affidavits and papers and record, there was offered:

(1) The affidavit of Anna G. Saft, bookkeeper in New York of the co-partnership of plaintiff and David Costaguta & Company, and of the latter until February 17, 1920, when the American-European Trading Corporation was organized, with exhibits (Rec., p. 177), the effect of which was to trace through bank accounts by deposits and checks the funds of the co-partnership, or hosiery department,

collected to the amount of $44,404.16 from sales in New York into the 9091 hides, title to which was transferred by David Costaguta & Company to the American-European Trading Corporation in February, 1920, and admittedly now held by the latter in the district.

(2) The affidavit of plaintiff in reply to the affidavit of Leon Grumet, &c. (Rec., p. 187), with exhibits.

The Opinion of Judge Hand.

On April 7, 1920, Judge Hand rendered and filed his opinion (Rec., p. 223). His Honor delivered his opinion under two heads:

(1) On the motion for a receiver and an injunction, which he denies; and

(2) On the motion to dismiss the service and vacate the order for substituted service, which he grants.

No decree was then entered, and it was not clear from the opinion what order or decree the Court intended to enter, or whether its conclusions had been reached on jurisdictional grounds or not, and the Court left it to the defendants to present and serve plaintiff with appropriate orders. The defendants' attorneys respectively then served plaintiff with two drafts of proposed orders, which appear in the record as "A," page 235, and "B," page 238, to which plaintiff's solicitors filed their objections and exceptions on the several grounds, among others, that the vacation of the orders for service by publication and the dismissal of plaintiff's bill on such motions would deprive the plaintiff of his constitutional right to have his day in the court provided for by law, and would deprive him of his property without due process of law.

The Decrees Denying Relief, Vacating Service and Publication and Dismissing the Bill.

The learned District Judge signed the decrees as so drafted by the defendants' solicitors on April 10, 1920 (Rec., p. 241, and Rec., p. 244).

The Appeal of Plaintiff.

On April 10, 1920, the plaintiff presented his petition for appeal to this Court (Rec., p. 249), which was allowed by Judge Hand (Rec., p. 247).

> "Upon the ground that the bill of complaint was dismissed for want of jurisdiction and that this Court, on the bill, has no jurisdiction of the subject matter and of the persons mentioned therein."

Certificate of District Judge.

The certificate of the Judge made on the same day (Rec., p. 251) refers to said decrees vacating the order for service by publication and dismissing the bill, and states:

> "I hereby certify that said decrees were entered solely because the case as made by the bill did not set forth a legal or equitable claim to or lien on the property in the District, of which this Court would have jurisdiction within the meaning of Section 57 of the Judicial Code, or in which this Court could render a judgment otherwise than a judgment *in personam* against the non-resident aliens who appeared specially and objected to the jurisdiction of the Court."

The Assignments of Error.

The assignments of error filed with the appeal are set forth at large in the record (p. 757). Briefly stated, they are that the Court erred in said decrees:

(1) In holding that the plaintiff by his bill did not assert a legal or equitable title or lien to property in the district.

(2) In holding that the claim asserted in the bill could only be enforced by a personal judgment against the non-residents and not by decree operative against the property in the district.

(3) In vacating the order of March 16, 1920, for service of the said order upon the resident defendants in charge in the district of the property of the non-resident defendants, and declaring everything done under the order void.

(4) In vacating the order for service on the non-resident defendants by publication, depriving plaintiff of his constitutional right to invoke and have exercised the jurisdiction of the Court, and depriving the plaintiff of his property rights without due process of law.

(5) In dismissing the bill as to the non-resident defendants for want of jurisdiction.

(6) In dismissing the bill as to the non-resident defendants for alleged failure to set forth a cause of action of which the Court had jurisdiction.

(7) In dismissing the bill as to the resident defendants for want of jurisdiction.

(8) In dismissing the bill as to the resident defendants for alleged failure to set forth a cause of action of which the Court had jurisdiction.

(9) In dismissing the bill as to the resident defendants because the non-resident defendants were indispenable parties in person to give the Court jurisdiction over the resident parties.

(10) In dismissing the bill for want of jurisdiction before the time fixed in the order of publication for the defendants to plead, answer or demur.

(11) In dismissing the bill for want of jurisdiction as to the resident defendants on affidavits submitted by them going to the merits of the cause of action on a special appearance limited to the question of jurisdiction.

(12) In that the dismissal of the bill for alleged want of jurisdiction on interlocutory hearing deprive the plaintiff of his right to have the property on which he claims a lien conserved and protected on appeal to this Court or the Court of Appeals from interlocutory orders.

(13) In that said decrees unlawfully deprive the plaintiff of his constitutional right to invoke the jurisdiction of the District Court in the controversy in this cause by the methods and processes provided by law, whereby he is entitled to invoke and make the jurisdiction of the Court effective by such processes and means as will protect his property rights as well as his rights as a citizen of the United States to litigate said claim in said Court.

(14) In that in and by said decrees the Court refused, on account of alleged want of jurisdiction, to give the plaintiff the protective relief prayed by restraining order, injunction and receiver, to protect and conserve the property in the district *pendente lite*, and to allow the controversy to proceed in due course of equity proceedings, and thereby the Court in advance of the time and stage of the proceedings at which such rights of the parties could be lawfully finally adjudicated, deprived itself of jurisdiction to enforce plaintiff's rights as to the *res* in said controvery, and so deprived plain-

tiff of his constitutional right of due process of law.

POINTS.

I.

The District Court had general jurisdiction of the parties.

The suit is of a civil nature in equity and is brought in the Southern District of New York by a citizen and resident of the State of New Jersey against four defendants who are non-resident aliens, one defendant who is a resident alien, and one defendant who is a corporation organized under the laws of New York.

It is within the constitutional grant of power (Art. III, Sec. 2). It is within the original jurisdictional powers conferred on the Distri . Court by Section 24 of the Judicial Code.

In *Ryan* v. *Ohmer*, 233 Fed. 165, Judge Mayer, sitting in the District Court for the Southern District of New York, held (head-note):

> "Under Judicial Code (Act March 3, 1911, c. 231), Sec. 24, 36 Stat. 1091 (Comp. St. 1913, Sec. 991), declaring that the District Court shall have original jurisdiction of all suits of a civil nature between citizens of different states, or between citizens of a state and foreign states and subjects or citizens, the District Court has jurisdiction of a suit wherein a citizen of one state was plaintiff, and a citizen of another and a subject of a foreign power were defendants."

The opinion of Judge Mayer in the case last cited is convincing and reviews the authorities on the

question pro and con and concludes with the following observations (p. 167):

> "An analysis of the reasoning which has led the various courts and text-book writers to come to their conclusions will not be profitable. The question will continue to be one as to which marked differences of opinion will exist until the Supreme Court has occasion to construe the statute. Of course, the question is close, and, ordinarily, a doubt will be resolved against jurisdiction; but as between the narrow view, well supported by close reasoning, and the broader view, which seeks to escape too fine a distinction, I choose the latter. I do this the more willingly because a reading of the complaint suggests to me that a considerable delay incident to the settlement of the question of jurisdiction might do injustice to plaintiff in denying to him an opportunity to obtain his relief promptly, if he is entitled to it.
>
> The motion to dismiss is denied."

See also:

> Baker & Bro. v. Pinkham et al., 211 Fed. 728.

In *Roberts* v. *Pacific, &c., Co.*, 121 Fed. 785, the Circuit Court of Appeals, 9th Circuit, held (headnote)

> "In a suit by a plaintiff, who is a citizen of the state where it is brought, against two defendants, the fact that one is a citizen of a different state, and the other an alien, does not deprive a federal court of jurisdiction, nor prevent a removal from a state court under the judiciary act of 1887-88 (Act March 3, 1887, 24 Stat. 552, as amended by Act Aug. 13, 1888, 25 Stat. 433, U. S. Comp. St. 1901, p. 507), where either defendant might have removed the suit if sued alone, and they join in the petition for removal."

The judicial power vested in the Courts of the United States by Section 2 of Article III of the Constitution extends to controversies "between citizens of different states; * * * and between * * * citizens (of a state) * * * and foreign * * * citizens or subjects."

This Court has definitely settled that the judicial power as so conferred by the Constitution in the above-quoted language is not limited to suits in which all the controversies in such suits are wholly between citizens of different states or wholly between citizens of a state and foreign citizen or subjects, but the existence in the suit of one separate controversy over which the express power exists carried the power to take jurisdiction of the whole suit.

> Barney v. Latham, 103 U. S. 215 (and repeated adjudications).

The question then is simply whether Congress has conferred jurisdiction on the District Court by Section 24 of the Judicial Code. The pertinent provisions of that section provide that the District Court shall have original jurisdiction:

> "First, of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and * * * (a) (Federal question clause) or (b) is between citizens of different states, or (c) is between citizens of a state and foreign states, citizens, or subjects."

Clauses (b) and (c) are substantially in the language of the judicial power described in Article III, Section 2, of the Constitution. The only structural difference is the use of the disjunctive "or" in the place of the semi-colon in the two clauses.

The question made is, in any civil suit involving the jurisdictional amount brought by a citizen of one state against a citizen of another state and against an alien, has the District Court been given original jurisdiction by Section 24, notwithstanding that the jurisdiction as to one set of defendants is under clause (b) and the other under clause (c)? We think that the question is answered in the provisions of Section 28 of the Judicial Code itself. It is there provided:

> "* * * Any other suit of a civil nature, at law or in equity, of which the District Courts are given jurisdiction by this title * * * may be removed into the District Court."

In other words, the only removable suits of a civil nature are those of which the District Courts are given original jurisdiction by Section 24.

It is therein also provided (Sec. 28):

> "And when in any suit mentioned in this section there shall be *a controversy which is* wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested *in such controversy,* may remove said suit into the District Court of the United States for the proper district."

Then follows the provision:

> "And where a suit is now pending, or may hereafter be brought in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being such citizen of another state, may remove such suit into the District Court of the United States for the proper district, at any time before the trial thereof; * * *

(when local prejudice is made to appear, &c.):

Provided, That if it further appear that said suit can be fully and justly determined as to the other defendants in the state court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said District Court may direct the suit to be remanded, so far as relates to such other defendants, to the state court, to be proceeded with therein."

The suits on which this proviso could operate could only be suits in which there are "separable controversies," or, in the language of the proviso, a suit in which there could be a "separation" without "prejudice" to the rights of the parties. The use in the proviso of the words "as to the other defendants" and "so far as relates to such other *defendants*" carries the provision back to the separable controversy clause, in which only "other" defendants are mentioned, as contradistinguished to the defendant being such citizen of another state in the separate controversy wholly between citizens of different states.

Considering the judicial history of these removal provisions, there can be no doubt that it was the intent of Judicial Code provisions in Section 28 to allow the removal by defendants of suits in which there were separable controversies, one of which controversies is wholly between citizens of different states, and the other controversy between the plaintiff and the "other defendants" and which need not be between citizens of different states. (*Barney* v. *Latham*, 103 U. S. 215.) But with the limitation that the suit as a whole must be one of which the Court is given jurisdiction by Section 24. Now, if the Court cannot acquire original jurisdiction of such a suit except it be wholly between citizens of

different states, or wholly between a citizen of a state and aliens, the cases provided for in the proviso would be wholly lacking, and the proviso would be meaningless. The clear intent of the proviso was to allow the remanding of all such controversies, not being the separable controversy wholly between citizens of different states, so removed if it can be done without prejudice.

In the case at bar, the main controversy is between the plaintiff and the alien defendants for an accounting and to enforce a partnership lien on property in the district, large, separate parts of which are in the district not transferred to nor in the possession of the American-European Trading Corporation, the New York corporation, and the other part, as averred in the bill, transferred by the alien defendants to the said New York corporation without other consideration than the issue of all the capital stock of the latter, aggregating $10,000, to members of the firm of David Costaguta & Company, all alien defendants, while assets of said Hosiery Section co-partnership, which were in process of liquidation, aggregating more than $200,000 in value, were so transferred to said corporation organized by the said alien defendants to receive and place the same beyond the reach of the plaintiff by legal process.

It is true that Leon Grumet, president of said corporation, has filed an affidavit to the merits admitting the said ownership of stock, but denying that the transfers were without consideration. But he substantially admits (Rec., p. 155) that the said corporation was organized to place the assets of the said alien defendants beyond the reach of attachments. The affidavit of Grumet was fully refuted by the counter-affidavits put in by the plaintiff.

We apprehend that as the appearances were special to the jurisdiction, and the lower Court dis-

posed of the case on the question of jurisdiction, the allegations of the bill in that respect must be taken as true for the purposes of this appeal. The allegations of the bill make the American-European Trading Corporation a mere agent or holder of title of personal property for the said alien defendants. So that if the bill had been filed alone against the alien defendants, and a receiver had been appointed of the co-partnership assets, service of the order of publication and restraining orders would have bound the corporation as a person in possession under Section 57 of the Judicial Code, even though it had not been made a formal defendant. And in such case the receiver, if the facts averred in the bill were undisputed on the merits, could have recovered possession of said assets by summary process (*Mueller* v. *Nugent*, 184 U. S. 1-15), or otherwise on plenary action.

The case against the alien defendants was a complete separable controversy for accounting and administration of assets of a co-partnership in process of liquidation, and that could have been completely determined between the parties without the presence of the American-European Trading Corporation, interested only in a portion of the assets.

In *Barney* v. *Latham*, 103 U. S. 205, the suit was by plaintiffs, citizens respectively of Minnesota and Indiana, and the individual defendants were citizens respectively of New York, Wisconsin and Massachusetts, and the defendant corporation was a citizen of Minnesota. The plaintiffs and the individual defendants were jointly owners of undivided interests in certain lands, the legal title to which it was in the power of the individual defendants to convey. The individual defendants organized a land corporation and conveyed all the lands to it, without the consent of the plaintiffs and, as charged in the bill, in fraud of the plaintiffs' rights, and appropriated the other and

additional joint assets and refused an accounting. The individual defendants denied all the material allegations of the bill. The defendant land company admitted the conveyance to it had been made "without consideration by it paid," and "that the stock therein is all held by its co-defendants and the heirs or personal representatives of D. N. Barney."

The Court said:

> "The complaint, beyond question, discloses more than one controversy in the suit. There is a controversy between the plaintiffs and the Winona and St. Peter Land Company, to the full determination of which the other defendants are not, in any legal sense, indispensable parties, although, as stockholders in the company, they may have an interest in its ultimate disposition. Against the latter, as a corporation, a decree is asked requiring it to convey to the plaintiffs an undivided two-ninths of one thirty-seventh of certain lands, and to account for the proceeds of the lands by it sold subsequently to the conveyance from the railroad company.
>
> But the suit as distinctly presents another and entirely separate controversy, as to the right of the plaintiffs to a decree against the individual defendants for such sum as shall be found, upon an accounting, to be due from them upon sales prior to the conveyance from the railroad company. With that controversy, the land company, as a corporation, has no necessary connection. It can be fully determined as between the parties actually interested in it without the presence of that company as a party in the cause. Had the present suit sought no other relief than such a decree, it could not be pretended that the corporation would have been a necessary or indispensable party to that issue. Such a controversy does not

> cease to be one wholly between the plaintiffs and those defendants because the former, for their own convenience, choose to embody in their complaint a complete controversy between themselves and the land company. When the petition for removal was presented, there was in the suit, as framed by the plaintiffs, a controversy wholly between citizens of different States, that is, between the plaintiffs, citizens, respectively, of Minnesota and Indiana, and the individual defendants, citizens of New York, Wisconsin and Massachusetts. And since the presence of the land company is not essential to its full determination, the defendants, citizens of New York, Wisconsin and Massachusetts, were entitled, by the express words of the statute, to have the suit removed to the Federal Court."

And the Court said:

> "A defendant may be a proper but not an indispensable party to the relief asked."

While the general rule is that fundamental jurisdiction is dependent upon the conditions at the beginning of the suit, the rule does not necessarily apply to the citizenship of parties who may be made defendants but who are not indispensable parties, or matters which can be waived.

In *Ladew* v. *Tenn. Copper Co.*, 179 Fed. 245, the plaintiffs were citizens of New York and West Virginia, and the defendants were, respectively, corporations of New Jersey and of Great Britain. The suit was to abate a nuisance created by property located in the district. Separate motions to dismiss were made: (1) By the New Jersey corporation on the ground that the Court had no jurisdiction because an action to abate a nuisance was not within the 8th Section of the Act of 1875 (embodied in Section 57 of the Judicial Code); and (2) by the English corporation upon the ground

that the Court had no jurisdiction because a citizen cannot sue a citizen and join an alien defendant in the same action. The Court granted the former motion and dismissed the bill as to the New Jersey corporation. But it refused to grant the latter motion, holding (p. 256) that a just construction of the Act under the weight of authority would allow such joinder.

The order dismissing the bill against the New Jersey corporation for want of jurisdiction was appealed by the plaintiff to this Court and affirmed.

Ladew v. Tenn. Copper Co., 218 U. S. 357.

Although in that case if the joinder of the New Jersey corporation and British corporation, as defendants, was not authorized by the statute, it would have made a case of want of fundamental jurisdiction on the face of the bill in the Trial Court of which this Court would have been called upon, *sua sponte,* to dismiss the bill on that ground, and although the point was called to this Court's attention in the record, it confined its discussion entirely to the question of the existence of a lien, and in affirming did not allude to the other question except as follows (p. 364):

> "The Court, speaking by Judge Sanford, *who delivered a well-considered opinion in the case,* sustained the motion of the Tennessee Copper Company, and dismissed the bill as to it. The motion of the British company was overruled, the Court held that it had jurisdiction over the alien corporation."

We think that this was intended substantially as an approval of Judge Sanford ruling on both questions.

None of the defendants in the present case filed any pleadings raising the question of any mis-

joinder of the two separable causes of action, in each of which, separately considered, the Court without question was given jurisdiction by Section 24 of the Judicial Co , and the decrees of dismissal and certificate of the Judge show that the alleged want of jurisdict n was not predicated upon any other ground than tha: the action did not set forth a lien or claim within the meaning of Section 57.

II.

The relation and liability of partners to their creditors and as between themselves in a business contemplated to be carried on in more than one country are questions of general commercial law.

For the purpose of protecting creditors the laws of Argentine or any other state might require that special partnerships shall register and advertise their partnership contracts under penalty that no limited liability shall be recognized as between them and third persons. But the partnership relation is not one created by statutory law, it is as old as the Roman law itself, and depends upon the fact of the relation and not upon the name which may be given to it in any particular state.

In *Lindley on Partnership*, Law Library edition, p. 69, star. p. 7, the definitions of partnership from Ces Lois Civiles, Grot. LeDroit de la Guerre et de la Paix, Pothier, etc., are summarized. So in 3rd Kent's Commentaries, Section 24, it is pointed out that the relationship and mutual rights and liabilities have been recognized in all civilized states. And it is there stated under the civil law of Spain that "partnerships may be formed as in the English Law, tacitly as well as expressly." It was there shown

that the relation of partnership and its definitions and qualities were in substance the same the world over.

Where a contract entered into in Buenos Aires between citizens of that state and an American citizen and Italian and French citizens, which contemplates operations in buying and selling, both in Buenos Aires and the United States and elsewhere, the creation of liabilities to third persons in foreign countries, the sharing of losses and gains, the rights of each of the parties to have the community assets applied to the creditors and to a control in the division of assets, and a question arises over assets in the United States, the Courts here will apply the law of the forum as a question of general commercial law, and will not be bound by the laws of Argentine so far as it affects such property situate in this country.

In *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, the question arose over the validity of a limitation of liability in a contract of affreightment made in New York for shipment to Liverpool, the Court said (p. 443):

> "It was argued for the appellant, that the law of New York, the *lex loci contractus*, was settled by recent decisions of the Court of Appeals of that state in favor of the right of a carrier of goods or passengers, by land or water, to stipulate for exemption from all liability for his own negligence. *Mynard* v. *Syracuse Railroad*, 71 N. Y. 180; *Spinetti* v. *Atlas Steamship Co.*, 80 N. Y. 71.
>
> But on this subject, as on any question depending upon mercantile law and not upon local statute or usage, it is well settled that the courts of the United States are not bound by decisions of the courts of the State, but will exercise their own judgment, even when their jurisdiction attached only by reason of the citizenship of the parties, in an action at

law of which the courts of the State have concurrent jurisdiction, and upon a contract made and to be performed within the State."

"It was also argued in behalf of the appellant, that the validity and effect of this contract, to be performed principally upon the high seas, should be governed by the general maritime law, and that by that law such stipulations are valid. To this argument there are two answers:

First. There is not shown to be any such general maritime law. The industry of the learned counsel for the appellant has collected articles of codes, decisions of courts and opinions of commentators in France, Italy, Germany and Holland, tending to show that, by the law administered in those countries, such a stipulation would be valid. But those decisions and opinions do not appear to have been based on general maritime law, but largely, if not wholly, upon provisions or omissions in the codes of the particular country; and it has been said by many jurists that the law of France, at least, was otherwise."

"The rule that the courts of one country cannot take cognizance of the law of another without plea and proof has been constantly maintained, at law and in equity, in England and America."

The Court then quotes with approval Mr. Justice Willes in *Lloyd* v. *Guibert,* L. R. 1 Q. B. 115, 129, as follows:

"In order to preclude all misapprehension, it may be well to add, that a party who relies upon a right or an exemption by foreign law is bound to bring such law properly before the court, and to establish it in proof. Otherwise the court, not being entitled to notice such law without judicial proof, must proceed according to the law of England."

In *Walworth* v. *Harris*, 129 U. S. 355, the case arose over a conflict of the laws of Arkansas and of Louisiana, each of the parties claimant having valid contract liens in their respective states, but the legal contest arising in Louisiana, where the cotton was. After reviewing numerous authorities the Court said, reviewing its own previous decision (p. 364):

> "and while it was seen that in many cases it had been held that a court of one State would give effect to the law of domicil of another State, it was said: 'But after all, this is a mere principle of comity between the courts, which must give way when the statutes of the country, where property is situated, or the established policy of its laws prescribe to its courts a different rule.'"
>
> "The municipal laws of a country have no force beyond its territorial limits, and when another government permits these to be carried into effect within her jurisdiction, she does so upon a principle of comity. In doing so, care must be taken that no injury is inflicted upon her own citizens, otherwise justice would be sacrificed to comity. * * * If a person sends his property within a jurisdiction different from that where he resides, he impliedly submits it to the rules and regulations enforced in the country where he places it." See also *Olivier* v. *Townes*, 2 Martin (N. S.) 93; *Denny* v. *Bennett*, 128 U. S. 489.

In *Chatenay* v. *Brazilian Submarine Tel. Co.*, (189'), 1 Q. B. 79, the Court said:

> "One inference which has been always adopted is this: if a contract is made in a country to be executed in that country, unless there appears something to the contrary, you take it that the parties must have intended that that contract, as to its construc-

> tion, and as to its effect, and the mode of carrying it out (which really are the result of its construction), is to be construed according to the law of the country where it was made. But the business sense of all business men has come to this conclusion, that if a contract is made in one country to be carried out between the parties in another country, *either in whole or in part*, unless there appears something to the contrary, it is to be concluded that the parties must have intended that *it should be carried out according to the law of that other country*. Otherwise a very strange state of things would arise, for it is hardly conceivable that persons should enter into a contract to be carried out in a country contrary to the laws of that country. That is not to be taken to be the meaning of the parties, unless they take very particular care to enunciate such a strange conclusion. Therefore the law has said, that if the contract is to be carried out in whole in another country it is to be carried out wholly according to the law of that country, and that must have been the meaning of the parties. *But if it is to be carried out partly in another country than that in which it is made, that part of it which is to be carried out in that other country, unless something appears to the contrary, is taken to have been intended to be carried out according to the laws of that country.*"

See also the very able opinion of Brown, *J.*, in *The Brantford City*, 29 Fed. 373.

In *Watts* v. *Camors*, 115 U. S. 353, the Court said:

> "Americans and Englishmen entering into a charter-party of an English ship for an ocean voyage, must be presumed to look to the general maritime law of the two countries, and not to the local law of the state in which the contract is signed."

So in the case at bar, the plaintiff, a citizen of the United States, who had been conducting a similar business in New York, entered into a partnership with a citizen of Argentine, another of France and two of Italy, by which the operations of the copartnership were to be and were conducted in South America, Europe and in the United States in the buying and selling of merchandise. There is nothing in the contract showing an intent to have it construed by Argentine law, and the presumption must be that the general commercial law was to control.

III.

There was no competent evidence offered by the defendants that a partnership between the plaintiff and the members of David Costaguta & Company did not exist under the laws of Argentine.

The affidavit of Manuel Garza-Aldapa for defendants (Rec., p. 162) indicates that he is a native of Mexico, an attorney at law, and admitted to the bar of Mexico. He qualifies himself as follows and says: "I am well acquainted with the civil law in force in Spanish America. I have made a special study of the laws of the Argentine Republic, and I am well acquainted with the same." He then states:

> "I have carefully examined a Spanish copy of the contract made at Buenos Aires, Argentine Republic, November 1st, 1917, between David Costaguta & Company and Henry S. DeRees. This contract does not constitute a partnership under the Argentine law for the following reasons."

He then gives a number of reasons for his conclusion, which he says is based on Argentine law. Some of his conclusions apparently are based upon statutes which he does not set out, some evidently are based upon the unwritten law, and no authority of any kind is cited or quoted.

The affidavit as a whole does not state the law as a fact, but amounts simply to a judicial opinion by a man who it does not appear ever was in Argentine, and who makes no claim to have practised in her courts, but simply claims that "I have made a special study of the laws of the Argentine Republic" and "am well acquainted with the same."

> "An Englishman describing himself as a 'certified special pleader' and 'familiar with the Italian law' was held incompetent to prove it."
>
> In re Bonelli, 1 P. D. 69-45, L. J. P. & Adm., 42-44 Wkly. Rep. 255.

> "A member of the English bar practicing before the Privy Council is not as of course an expert to give evidence concerning the laws of those countries for which the Privy Council is the ultimate court of appeal."
>
> Cartright v. Cartright, 26 Wkly. Rep. 684.

> "One who has acquired his knowledge by mere study is incompetent."
>
> Idem.
>
> Bristow v. Sequeville, 5 Exch. 275.
>
> 14 Jur. 674-19, L. J. Exch. 289.
>
> 16 Cyc. 887.

The written laws of a foreign country must be proved by the best evidence of which the nature of the case is susceptible and no testimony will be received which presupposes better testimony attainable by the party who offers it. In general authenticated copies of written laws are expected to be produced.

> Ennis v. Smith, 14 How. 400.

See also Story's Conflict of Laws 525 and numerous decisions cited in notes to *Ennis* v. *Smith,* 14 How. 400 (14 Bk. Coop. Ed. 472).

It is only the unwritten laws which can be proved by an expert.

Item.

In *Slater* v. *Mexican N. R. R. Co.,* 194 U. S. 120, the Mexican statutes relied upon by the parties were proved and translations submitted, after which the deposition of a Mexican lawyer as to the accepted construction by the Mexican courts was offered. On this point Mr. Justice Holmes for the Court said (p. 130):

> "The defendant offered the deposition of a Mexican lawyer as to the Mexican law. This was rejected, subject to exception, seemingly on the ground that the agreed translation of the statute was the best evidence. *So no doubt, they were, so far as they went,* but the testimony of an expert as to the accepted or proper construction of them is admissible upon any matter open to *reasonable doubt.*"

In the case at bar the affiant, not an Argentine lawyer, undertakes to testify that the contract "is not drawn up in the form required for partnership articles by Article 291 of the Code of Commerce of the Argentine Republic," without quoting the article, so that the Court can for itself determine what the effect of the stattue is. Whether it is merely a permissible or directory form, or whether it is one to protect creditors against silent partners, or whether it affects in any respect the liability and rights of partners as between themselves. The affidavit is utterly incompetent and should not have been considered on such a proceeding as this, where the witness is not even exposed to cross-examination.

IV.

The plaintiff and the individual members composing the firm of David Costaguta & Company were and are co-partners with all the rights and privileges to which that relationship gives rise.

In his opinion (Rec., p. 225) his Honor Judge Hand expressed a doubt as to whether there existed a co-partnership under the contract of November 1, 1917, at all, although he did not put his judgment upon that ground, that doubt appears to have been potential in his taking into consideration the *ex parte* affidavits of defendants going to the merits.

The contract (Exhibit "A," Spanish; Exhibit "B," agreed English translation, Rec., p. 82), annexed to the moving affidavit of the plaintiff, clearly creates a co-partnership between the plaintiff, on the one hand, and David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi, on the other.

Briefly analyzed, the contract provides (Art. 1) that a special section to be known as the "Hosiery Section" shall be established on the premises and in the name of David Costaguta & Company "for the purchase" and "sale" of hosiery and knitted goods in the City of Buenos Aires *and elsewhere*, as may be agreed upon, which the plaintiff was "to direct and have charge of," thus expressing and implying that the plaintiff was to have exclusive charge of both the purchases and the sales of the goods of the section.

By Article 2 David Costaguta & Company reserved the right to "pass on and fix the credits and conditions of sale," and by Article 3 to have submitted to them for approval "the arrangements of purchases" while the plaintiff was in Buenos Aires,

"whereas, when he goes to North America or Europe to make purchases he shall have complete liberty of action within the sums which Mess. David Costaguta & Company may fix in writing."

By Article 4 it was provided that certain specific expenses directly belonging to it, such as the salaries of the employees of the section, shall be charged to it, whereas other expenses, such as rent, light, heat, salaries of bookkeepers, etc., should be charged exclusively to the account of David Costaguta & Company, therefore contemplating that the section as such should and did have a separate and distinct character and entity with its own employees, of whom the plaintiff was, by Article 1, "to have charge" of. And there were to be books kept for that business on which David Costaguta & Company were to have an account of debits and credits.

There was ample provision therefore for the plaintiff to make the sales by himself and the employees of the section when he was in Buenos Aires, and for the sales to be made by the employees of the section when he was absent, under his directions however given, the contract contemplating his absence to make the purchases or sales, but reserving no control by Costaguta & Company over the direction and control of the business other than as limited by the express terms of the contract.

By Article 5 it was provided that on October 31st of each year a "balance shall be struck, and the deductions which shall be deemed advisable to make in the merchandise, as well as in the credits, shall be determined by common accord" between David Costaguta & Company and the plaintiff. This clearly contemplates that at such annual periods when balances shall be made both parties should be considered as having an interest "in the merchandise" as well as "in the credits" which could not be

divested and the whole interest shifted into one party except by "common accord." It also necessitated that the merchandise and accounts of the "Hosiery Section" should be kept segregated from that of any other business of David Costaguta & Company.

Article 5 further provides: "From the resulting profits (of the section) there shall be deducted 6% annual interest on the capital which David Costaguta & Company may have supplied to the section." The calculation of interest on the capital advanced "shall be made every six months, an account current being established with disbursements and receipts of funds (meaning as between Costaguta and the section), and, in case the earnings of the fiscal period do not cover the interest, the balance will be passed to the following period."

Article 5 further provides that after taking account of interest and capital advanced "the remainder shall be distributed in the following proportions:

> *"55% to Messrs. David Costaguta & Company and 45% to Mr. DeRees; the losses shall be borne in the same proportion."*

Here we have an agreement for a division of both profits and losses of the "section" between the parties, which established the relation of partnership, and it is to be observed that the plaintiff's interest in the profits is not in lieu of compensation for services, but a community interest in the profits as profits and an obligation to pay losses, if any, sustained.

In the clause above quoted as to "distribution" of the profits, it is not specified by whom the "distribution" is to be made, but, by the first clause of this article, above quoted, clearly it could not be made otherwise than by the "common accord" which is the rule in all contracts of partnership.

Article 6 provides for a monthly drawing account for the plaintiff "which shall be charged to his personal account." This clearly would mean that the money was to be withdrawn from the moneys of the "section" as an advance on his share of the profits at the end of the fiscal year. Nothing is said in this clause as to whether he was to be charged with interest on the items so withdrawn on said drawing account.

Article 7 provides:

> "Mr. DeRees may withdraw his share of the profits, only to the amount of fifty per cent, being under the obligation to leave the balance on deposit with Messrs. David Costaguta & Company, drawing an annual interest thereon at 6%."

This provision is not one in relation to all the funds of the section. It relates to the plaintiff's profits ascertained and distributed at the annual settlement periods. The use of the words "leave," "on deposit with Messrs. David Costaguta & Company" might raise the implication that this as well as the general funds of the section were to be kept on deposit even before distribution in that "house." This implication does not necessarily follow, however, because the half of the plaintiff's share of the profits was not, after such annual division of profits, to be "left" in any account of the moneys of the section, but to be on deposit as a special fund in which he individually was interested and on which he individually got interest. That individual deposit could only serve as security to Costaguta & Company during the continuance of the contract for the faithful performance by the plaintiff of his part of the contract, but could not be forfeited for an infraction by the plaintiff of the contract in the particulars

provided for in Article 8, as the right of forfeiture is limited to the plaintiff's share of the profits of the current year in which the specified infractions occur, and therefore could not apply to that left on deposit at the end of the preceding year.

The contract is silent as to where the operating funds of the co-partnership were to be kept on deposit. As interpreted by the acts of the parties as set forth in the bill and moving affidavit, the cash receipts in Buenos Aires were deposited with David Costaguta & Company, and those in New York with banks in New York, sometimes in the name of plaintiff and sometimes in the name of David Costaguta & Company, but for the account of the "Hosiery Section." But it is very clear from the provisions of Articles 4 and 5 that all of the merchandise and accounts were to be kept separate from others in which David Costaguta & Company were interested, and from those provisions that the funds of the co-partnership when so deposited with David Costaguta & Company were to be held precisely as a bank would hold them for a customer on deposit, and subject to account and pay-over at the annual adjustments provided for in Article 5.

Article 8 imposed the obligation upon the plaintiff (1) to give all his activity to the business of the section; (2) not to participate in other commercial business; (3) not to be interested in any other matter foreign to the "section" and for breach of any of those provisions it gives the right to Costaguta & Company "not to recognize in favor of DeRees the profits which are earned during the fiscal period in which the violation has taken place." "Fiscal period" is used in Article 5 as synonymous for the year from October 31 to October 31. Therefore Article 8 means the right to

forfeiture of the profits of any fiscal year in which the infraction occurs.

If there has been a "common accord" division of profits on the 31st of October of any year it would be a waiver on the part of Costaguta & Company to claim forfeiture for the year in which the adjustment of profits for that year had taken place, as provided in Article 5.

Article 9 is unimportant.

Article 10 provides:

> "The parties reserve the right to terminate the present agreement upon notice of 3 months by registered letter."

This requires written notice.

Article 11 provides that *both* parties

> "on receiving the notice of termination of the present contract may request the liquidation of the merchandise existing in the house, in the Customs House, in transit, or in course of manufacture, pertaining to this Section, Mr. DeRees obligating himself to give his co-operation up to the moment the liquidation is terminated, and Messrs. David Costaguta & Co. as sole owners of the business shall pay to Mr. DeRees the amount corresponding to him in installments *which are established in the following article.*"

This article deals solely with the status of the parties upon and in the event that three months' notice of termination of the agreement has been given by either party in writing, as provided by Article 10. On the receipt of such notice the plaintiff is to co-operate up to the moment in which the liquidation is terminated. At the moment all of the merchandise wherever situate had been liquidated and the balance between the partners struck by common accord and payment of the first installment made, the further interest of the plain-

tiff in the business was to cease, other than in obtaining other deferred installments fixed by common accord. At that moment it might be that all the credits of the section might not have been collected or liquidated, but their value would have been fixed by common accord, and "the business" was then to become the sole property of Costaguta & Company, and Costaguta & Company "as sole owners of *the business* shall pay to Mr. DeRees" the balance to which he is entitled, the payments to be made "in the installments which are established" in Article 12, the first of which was to be in cash, *i. e., contemporaneously* with the complete liquidation and the determination of the balance, and the passing of sole ownership to Costaguta & Company. That this is the correct interpretation seems clear from Article 12.

Article 12 provides that in case the contract is terminated by either party by the requisite notice pursuant to Article 10 and the preceding article is not applied in so far as it refers to an eventual liquidation of the stock in hand,

> "*a balance shall be made, observing with regard to deductions the form indicated in Article 5,* and Messrs. David Costaguta & Co. shall take charge of the assets and liabilities, paying the amount which results in favor of Mr. DeRees in four equal installments, the first in cash, and the others in installments of six, twelve and eighteen months, with interest at 6%."

The words "observing with regard to deductions the form indicated in Article 5" refers back to the connection in which the word "deductions" is used in Article 5. That is to say, as we have already seen, the title to the merchandise as well as the credits was not to be passed from one party to the other except the deductions in value

were reached by "common accord" between them. But when that is made by common accord, then, under the provision of the Article 12 last quoted, the balance and the business, including assets and liabilities, was to be taken over by Costaguta & Company on paying over to the plaintiff the amount to which he would then be entitled. But the payments were to be in installments, payable, the first in cash, and the others in six, twelve and eighteen months. There is nothing in this article which would authorize Costaguta & Company, without the prescribed notice and without the plaintiff's consent and at their own will, to take possession and dispose of the goods belonging to the "section" as their own property without such balance mutually arrived at and paying the cash installment so found due the plaintiff and by the accord obligating themselves to pay the deferred liquidated installments.

Article 13 provides:

> "In case of the death of Mr. DeRees Messrs. David Costaguta & Co. will liquidate the stock in hand within the period of one year from the date of death; they will make a balance and pay the heirs of Mr. DeRees the amount which belongs to him, in the installments which are indicated in the preceding article. Interest at the rate of 6% annually will be paid also to the heirs."

It will be observed that this section follows the rule of law applicable to liquidation of a business by one partner on the death of the other, viz.: (a) One year for liquidation; (b) interest on the balance due the heirs after that time, and here by special contract the balance payable in six, twelve and eighteen months, bearing interest at 6 per cent. annually.

There is no doubt under the authorities, in view of the provisions of the contract, that the plaintiff and the members of David Costaguta & Company were co-partners in the business of the special hosiery section conducted in the name of David Costaguta & Company and upon its premises both here and in Buenos Aires. The test of partnership is a community of profit, a specific interest in the profits as profits as contradistinguished from a stipulated portion of the profits as compensation for services.

In *Ward* v. *Thompson*, 63 U. S. 330, this Court thus states the rule:

> "Where the parties have joined together to carry on a certain adventure or trade, for their mutual profit—one contributing the vessel, the other his skill, labor and experience, etc., and there is a communion of profits, on a fixed ratio, it is a partnership."

In *Berthold* v. *Goldsmith*, 65 U. S., 536, this Court said:

> "Whenever it appears that there is a community of interest in the capital stock, and also a community of interest in the profit and loss, then it is clear that the case is one of actual partnership between the parties themselves and, of course, it is so as to third persons."

Another definition by this Court is:

> "A contract of partnership is one by which two or more persons agree to carry on a business for their common benefit, each contributing property or services, and having a community of interest in the profits. It is in effect a contract of mutual agency, each party as principal in his own behalf and as agent for his co-partner."

Karrich v. Hannaman, 168 U. S. 334.
Mehan v. Valentine, 145 U. S. 611.

In the case at bar we have all of the ingredients of an actual partnership, capital supplied by the plaintiff at the inception of the relationship (pars. 9th and 12th of the bill), evidenced by the 31,253.99 pesos to the credit of his capital account at the inception of the contract (Rec., p. 95, Exhibit "I"), plus his community interest in the merchandise then on hand, aggregating 302,332.18 pesos (Rec., p. 94, Exhibit "H"). Nor is the question affected by the fact that the business was conducted in the name of David Costaguta & Company, and in Buenos Aires, at least, upon the premises of David Costaguta & Company and that the plaintiff's name did not appear as a partner in the transactions with third persons.

> "Persons who are associated in business pursuant to a contract which makes them partners *inter se* are partners as to third persons, even though they have attempted to prevent, or to conceal, the existence of a partnership."
>
> 30 Cyc. 382, and cases cited.

See also:

> Beauregard v. Case, 91 U. S. 132.
> Paul v. Cullum, 132 U. S. 539.

Besides all this, if the contract itself is in this respect in any way ambiguous, the averments of the bill charge that the agreement was a co-partnership, and the acts of the parties set forth in the bill, or which the plaintiff is entitled to have the Court consider on full hearing in the exercise of its jurisdiction, show that the relation was that of co-partnership.

To the opposition affidavit of Leon Grumet, president of the American-European Trading Corporation, there is attached (Rec., pp. 141, 191) as Exhibit "G" a copy of a suit by David Costaguta & Company against one Kitzmiller, verified by H. S. DeRees, September 9, 1919, as agent of David Costaguta & Company, which was apparently offered to set up an estoppel against DeRees, to show that their relationship was that of co-partnership. This was fully explained and met by the counter-affidavit of the plaintiff (Rec., p. 191), and in his affidavit he shows that in the lease of the premises for the Hosiery Section business in New York on March 30, 1918, taken in the name of David Costaguta & Company, he described himself as a member of the firm (Rec., pp. 188, 213). In the suit in question the name of DeRees as a silent partner had not entered into the contract with Kitzmiller, and undoubtedly as a partner he was agent for the other partners and he was entitled to bring suit in the name of the persons in whose name the contract was made.

The New York Code of Civil Procedure, Sec. 444, provides that

> "A person, with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express trust within the meaning of this section,"

which section authorizes suit in the name of the party in whose name the contract was made. The principle is not statutory, but general. But in no sense could estoppel be predicated upon that suit, and as mere declaratory evidence it is more than counterbalanced by the declaration in the lease referred to. The whole matter is of no importance on the question of the denial by the Court of initial jurisdiction in this case.

V.

On the termination of the partnership by agreement and entry on liquidation each partner has, and at the time of the commencement of this suit had, an existing and operative lien on the assets of the firm, and particularly on that part of the assets within the district, for whatever is due him from the co-partnership after the payments of its debts.

The general principle is so well established that no extended references need be made.

> "A partner's lien on firm property is not a legal or possessory lien, but an equitable lien; * * *. Indeed *its principal function is performed in preventing the diversion of the firm assets from* firm creditors, *and* after these are paid, *in securing an equitable distribution of the balance among the parties.* Accordingly, after firm debts are paid to outside creditors, this lien secures to each partner his share in the balance of the firm assets, as that share is ascertained on the final accounting between the partners."
>
> 30 Cyc. p. 453, citing many cases.

> "Of course, as in the case of other contracts, a partnership may be dissolved, at any time during the term for which it was organized, by the valid mutual agreement of the partners, including a dormant partner. It may be dissolved also in accordance with the mutual consent of the parties as expressed in the original articles of partnership."
>
> 30 Cyc. pp. 651-652, citing many authorities.

The partnership may also be dissolved by judicial decree for various causes.

30 Cyc. p. 656.

In the case at bar the dissolution as set up in the bill, and as is admitted, was by agreement of the parties and in accordance with the terms of the contract of partnership, and was operative from November 22, 1919.

The bill alleges that the plaintiff duly gave the requisite notice terminating the co-partnership as of November 22, 1919, and thereafter gave notice of demand for liquidation of the assets of the co-partnership, in both of which the defendants David Costaguta & Company acquiesced in writing (Rec., p. 17, and Exhibits "K" and "L," Rec., pp. 101-102).

The allegations of the bill show that the assets of the co-partnership were large, with large profits, and the liquidation had been commenced substantially four months before the bill was filed. It does not charge that there were any outstanding debts due by the co-partnership at the time the bill was filed. In the supporting affidavit of plaintiff it is stated (Rec., p. 201) that practically all the purchases of merchandise were made on very short term credits, allowing time for inspection after delivery in New York City, and that there is no outstanding indebtedness of the hosiery section unless it be some small amounts aggregating $1,000 or some small liabilities for current expenses.

The defendants' solicitors have argued that because there is a prayer in the bill (Rec., p. 26) that the co-partnership be "declared dissolved" that the purpose of the bill was to have a future dissolution declared, and that it asserted no operative lien as of the time of the filing of the bill; that only a

lien to be created by the suit, and not one previously existing and sought to be enforced is asserted. But this is by no means a proper construction of the prayer, which must be interpreted in connection with the allegations of the bill, which set forth an existing state of dissolution by agreement, and the existence (Rec., p. 25) of a present lien.

Upon a dissolution, however arrived at, in general, each partner has the right and duty of disposing of the firm assets for the purpose of winding up its affairs and of distributing the proceeds among the firm creditors and the partners.

> 30 Cyc. 664.
> Ambler v. Whipple, 20 Wall. 546.
> Karrich v. Hannaman, 168 U. S. 328.

In the latter case this Court quotes with approval (p. 337) from its previous opinion as follows:

> "However the question may be decided, whether one partner may by his own mere will dissolve a partnership formed for a definite purpose or period, it is clear that upon such a dissolution one partner cannot appropriate to himself all the partnership assets, or turn over the share of his partner to another with whom he proposes to form a new partnership."

And this Court further stated (p. 337):

> "In a court of equity, a partner who, after a dissolution of the partnership, carries on the business with the partnership property is liable, at the election of the other partner or his representative, to account for the profits thereof, subject to proper allowances."

Where there has been a dissolution, and while the partnership assets are in process of liquidation, the partnership lien is not an inchoate lien or mere

equity capable of being set in operation only by a decree of a court declaring a dissolution for cause, but is an active present right. This is true because on dissolution the agency between the partners is terminated except for the limited purposes of winding up the affairs of the co-partnership.

30 Cyc. 659 and authorities cited.

Where, therefore, one partner under color of his possession as a liquidator is appropriating and transferring the assets in violation of the rights of his co-partner, necessarily the latter must have a present right to immediately assert his lien for the protection of his right in the property itself.

Nor is the fact that the defendants are aliens and absent from the district a reason for denying the plaintiff's relief by injunction and receiver, to protect assets within the jurisdiction, until statutory service by publication can be had.

> "By the settled practice of the court in ordinary suits, a receiver cannot be appointed, *ex parte,* before the defendant has had an opportunity to be heard in relation to his rights, except in those cases where he is out of the jurisdiction of the court, or cannot be found; or where, for some other reason, it becomes absolutely necessary for the court to interfere, before there is time to give notice to the opposite party, to prevent the destruction or loss of property."
>
> Verplanck v. Mercantile Ins. Co., 2 Paige (N. Y.) 450.
> Mann v. Gaddie, 158 Fed. 42, 5th Cir.
> Einstein v. Schnebly, 89 Fed. 540.
> Watson v. Bettman, 88 Fed. 825.

In the case at bar the Court had, on the bill and moving affidavits, issued a temporary restraining

order restraining the disposition of the assets within the jurisdiction of the Court until a hearing could be had, and which had been made effective by service by the Marshal on the persons in possession of said property of the co-partnership.

This order was by the decree of the Court (Rec., p. 242) "annulled and cancelled" and the bill dismissed, the certificate of the Judge (Rec., p. 251) stating the decrees were so entered for want of jurisdiction under Section 57 of the Judicial Code.

We think that on the case as made the Court had complete jurisdiction by the assertion of an existing lien on property within the jurisdiction of the Court to protect *pendente lite* that property by injunction, receiver or other remedial process, while publication was in process, by which complete jurisdiction of the *res* would have been perfected but for the decree.

We can see no material difference between the principles announced in the foregoing cases and those applicable to the case at bar, where the nonresident partners after dissolution, transfer in bulk the major portion, aggregating some $200,000, of all the assets of the co-partnership in their possession or control within the jurisdiction, without the consent of the other partner, to a corporation of only $10,000 capital created by them, for the express purpose of evading legal process in the district and of which they own all the capital stock, and according to the bill, without other consideration than the transfer of all said capital stock to them, and according to the Grumet opposition affidavit, in the main for the corporation's promissory notes, the nature and terms of which are undisclosed. But as stated in said affidavit (Rec., p. 155) the purpose of the creation of said corporation and of said transfers to it, was to enable said David Costaguta & Company to transact business in New York through

said corporation without such assets being subject to attachment.

The opinion of his Honor Judge Hand as to the effect of these transfers, in the two parts into which he separates his opinion, seems to us quite at variance. In the first part of his opinion (Rec., p. 227) he said:

> "The firm had experienced irritating annoyances in having the status of a non-resident, and the organization of a domestic corporation was a perfectly legitimate way out. The *substance of the ownership remained quite as before,* but the assets were protected from attachments which had in the past caused waste. They were or *soon would be* the owners, and could never be called upon to turn over to DeRees any part of the assets in kind."

And he then proceeds to say that even if Costaguta & Company be solvent and the transferee corporation were entirely insolvent the transfer would still be valid (citing *Re Braue,* 248 Fed. R. 55). This part of his Honor's opinion seemed to us to be as devoid of sound equity principles as is the case cited, and he doubtless was misled by it without due personal consideration. But we agree with his Honor Judge Hand that in equity, after the transfers, the real ownership remained quite as before, except that partnership property in the possession of a liquidating partner, had been transferred to the private benefit of the transferror, with a corporate barrier erected between the true equitable owners and the property and with the effect of evading process in general, although the intent of evading attachments only is admitted.

In the second part of his opinion (Rec., p. 228) his Honor Judge Hand said:

> "If the liquidation included turning over to the plaintiff his share of the assets when converted into cash, I should agree that his lien, as it is generally called, entitled him to the protection of those assets in the hands of the liquidator and that he could by a suit under Sec. 57 of the Judicial Code, follow assets and insist upon the sequestration by a court, not of course for delivery to him, but at least to await the statement of the accounts and distribution in accordance therewith. *No partner* should be compelled *in the face of such an effort to trust to the continued solvency* of the liquidating partner; Holmes v. Gilman, 138 N. Y. 369; the right would be clear against the grantee and the grantors might be brought in by substituted service to conclude their rights in the fund."

In *Holmes* v. *Gilman*, 138 N. Y. 369, the effort was the appropriation by one while a liquidating partner to his individual use of a portion of the co-partnership assets. In the case at bar the defendant partners in liquidation have not only appropriated the assets to their own use before a partnership settlement as was provided for in the contract, but are attempting to take advantage of their own wrong to evade the jurisdiction of the Court, and they are denying the existence of the co-partnership and claiming all the co-partnership assets as their own.

In the case of *Holmes* v. *Gilman*, 138 N. Y. 369, the Court held:

> "A partner occupies a fiduciary position with regard to his co-partners and the funds of the firm, and may not make a personal profit out of the use of such funds.
>
> This relationship authorizes the same remedy on behalf of a partner who has been wronged by the appropriation by a co-partner to his own use of the funds of the firm, as would exist against a trustee in behalf of a *cestui que trust*.

> The wronged partner has the right, therefore, to follow the funds and, provided they can be clearly ascertained, traced and identified, and if the rights of *bona fide* purchasers for value do not intervene, to recover property into which such funds have been changed, together with the increased value thereof.
>
> It seems that when a trustee misapplies the trust fund, using it with moneys of his own in the purchase of property, while the whole property may not be claimed by the *cestui que trust*, his right is not limited to the amount misappropriated, but he is entitled at his option, to an interest in the property, including any increased value; he and his trustee being considered co-owners in the proportion that their contributions bore to the sum total invested."

This brings us to a consideration of the three points on which it would seem the Judge in the Court below rested his judgment on the question of jurisdiction.

VI.

The Court below was wrong in the view that under a proper construction of the co-partnership contract, the plaintiff's lien on the assets became extinct at the date of dissolution, and his rights converted into a simple contract claim against David Costaguta & Company.

In that part of his opinion in which he deals with the motion to dismiss service and vacate the order for substituted service his Honor Judge Hand said (Rec., p. 228):

"That a partner has usually no rights except a bill for accounting, pending the partnership scarcely needs any show of citation. I must take it, however, upon this motion that, pending liquidation, the liquidating partner, for the purpose of defrauding plaintiff, has transferred the firm assets to another. If so, the plaintiff has lost his rights *in rem* and is relegated to an action against the firm of David Costaguta & Co. * * *

However, this contract, always assuming it to create a partnership, is not of the usual kind. It permits the liquidating partner, as I have said, to take over all the assets as sole owner and to pay his share to the other partner in installments, with interest. In so providing I think that the partner's rights *in rem* were changed and that, in the absence of insolvency, the transfer could not be a fraudulent conveyance. The liquidating partner might deal as he pleased with his own so long as the transfer left him solvent.

The allegations in the bill that the purpose of the transfer was to prevent the plaintiff from recovering his share, must therefore yield, since it appears that they are necessarily without basis. Now it is quite true that under the contract as pleaded in the bill, David Costaguta & Company are not to become the sole owners of the business until the liquidation is completed, and possibly this is true under the contract itself. But I think that it makes no difference for this purpose whether they were to take over the business at dissolution or at the completion of the liquidation. In no event could the plaintiff ever receive any share in the assets as such, for in either case he is confined to his rights *in personam* against the firm upon their undertaking to pay in installments his share as eventually settled by liquidation. The only excuse for allowing him to proceed *in rem* would be his right to insist at some time upon the application of

this particular property to that payment at some future time, a right which at no time can he possess. I am of course aware that this disposition would end the case in this jurisdiction, but that is precisely the result which I think should follow, &c."

In the first part of his opinion his Honor had stated (Rec., p. 224):

"The first question is whether during the liquidation period DeRees should have a joint possession with David Costaguta & Company. I do not think that this can be determined by considering at what time David Costaguta & Company became 'sole owners' of the 'business' though on the whole it seems most probable that that was immediately on dissolution, and not at the completion of liquidation. They might, however, become owners only at the later period and still have the right of possession meanwhile. My reason for thinking that they did have immediate possession is that both articles Eleven and Twelve show that they were eventually in any case to get the whole 'business' and that in so far as the business involved anything but 'merchandise' in the nature of things, they became owners at once. This because they were not to divide the surplus with DeRees in specie, but under both articles it was to be treated as theirs, and they became indebted to him for his final share, payable in installments with interest. That effectively precludes any division; * * * Moreover I regard the phrase that DeRees should lend 'his co-operation' as putting the question beyond any doubt. It is not appropriate language to describe joint possession, but rather that DeRees, notwithstanding that the firm was charged with the duty to liquidate, was himself bound to help actively. Finally it is to be noted that for over three months DeRees allowed the firm to conduct the liqui-

> dation without protest, a pretty convincing indication that he supposed it was their right."

It will be observed that his Honor based his conclusion, that the said defendant partners became sole owners of the assets upon entry on liquidation and that the plaintiff then lost his lien, very largely upon his conclusion that by the contract they were made sole liquidators; and that he based his conclusion, that they were sole liquidators and entitled to exclusive possession of the assets and the right exclusively to dispose of them, very largely upon his conclusion that they became sole owners at the time of the liquidation.

We shall consider first the question as to whether by the contract David Costaguta & Company were to be sole liquidators on the other grounds urged by his Honor, exclusive of the alleged sole ownership reason, and deal with that separately.

It will be observed that his Honor, in the first clause of his opinion, defines (Rec., p. 223) what he understands by liquidation as the word is used in Articles 11 and 12 of the contract, as follows:

> "the merchandise must be 'liquidated,' i. e., sold, and David Costaguta & Co. must pay him his share when ascertained, with interest in four installments."

It is important to observe the provisions of the co-partnership contract relative to the buying and selling of the merchandise while the contract was to be in full swing and before the termination of the co-partnership on notice provided for in the subsequent clauses.

By Article 1 of the contract (Rec., p. 82) "The Hosiery Section" was established:

"for the purchase and sale of hosiery in general and other articles of knit goods, or any other line of goods which by common accord it is agreed to exploit, *authorizing Mr. DeRees to manage the Section."*

By Article 2:

"David Costaguta & Co. will pass on and fix the credits and conditions of sale for the clientele."

By Article 3:

"Mr. DeRees, during his stay in Buenos Aires shall submit to the approval of Messrs. David Costaguta & Co. the arrangement of purchases, whereas when he goes to North America or Europe to make purchases, he shall have complete liberty of action, within the sums which Messrs. David Costaguta & Co. shall fix in writing."

By Article 8:

"It shall be the duty of Mr. DeRees to devote all his activity to the service of the section, and he obligates himself not to participate directly or indirectly in any other commercial business, nor to be interested in any other business foreign to the section," &c.

By Article 10:

"The parties reserve the right to terminate the present agreement by giving notice of three months by registered letter."

These provisions make it clear that during the active existence of the partnership the conduct of the "management" of the purchases and sales of the business was committed by the contract to Mr. DeRees, with limitations which required the "co-operation" of both parties to the contract in the conduct of the business.

If those were all the pertinent provisions the rights of management and control of the liquidation after the termination of the contract by the notice provided for would have been left where the law puts it in all partnership cases, that is to say, equally in all the partners, without the exclusion of any. Moreover, the quoted provisions of the contract for the contribution of the services of Mr. DeRees, exclusive of all other business, would be terminated with the termination of the contract and the duty resting upon him as a co-liquidator would be that only which the law imposes upon all co-partners, but which, within the limits of winding up the partnership affairs, and the exercise of the utmost good faith toward the other partners, may be performed by one.

30 Cyc. p. 659.

It was for the purpose of assuring the continuance of the personal services of Mr. DeRees, as far as might be necessary, that it was provided by Article 11:

> "Both Messrs. David Costaguta & Co. and Mr. DeRees on receiving notice of the termination of the present contract may request the liquidation of the merchandise existing in the house, in the Custom House, in transit, or in course of manufacture pertaining to this Section. Mr. DeRees obligating himself to give his co-operation up to the moment the liquidation is terminated."

This provision of that article was made the subject of construction by the parties themselves in the letter of November 10, 1919, of Mr. DeRees to Costaguta & Company, Exhibit "K" (Rec., p. 101), and reply letter of the latter, November 11, 1919, Exhibit "L" (Rec., p. 102).

In this letter Mr. DeRees states that he is ready to assist in the liquidation, but that under the terms of the contract as he understood it, he was at liberty to engage after November 22, 1920, in other business without infraction of the contract, and in their said reply David Costaguta & Company said:

> "We note that you want a liquidation and are glad to note that you are ready to assist in effecting the same * * * We would like if possible *to have the liquidation made in such manner as would be entirely satisfactory to you, and accordingly would welcome any suggestions you care to make as to the manner of making the liquidation.* You have asked whether we agree with your interpretation that on and after November 22, 1919, you may if you see fit engage in any other business either for yourself or somebody else, we desire to say that our counsel in New York has advised us that in his opinion your interpretation of the contract in this respect is correct, with the qualification however which we think you will accept, namely, that on and after November 22, you are obligated to give such time as may be required at Buenos Aires as well as at New York to promptly complete the liquidation and if necessarily required to give all your time to the exclusion of all other business, &c."

Now this was a clear interpretion by the parties of the provision in Article 11 that after termination of the contract by notice, DeRees "obligated himself to give his co-operation up to the moment the liquidation be terminated" and that it was put there because it was recognized that the limitations as to DeRees engaging in other business provided in Article 8, would terminate at the time the active co-partnership should be terminated on notice, and to secure the continued personal services of Mr.

DeRees in the liquidation in co-operation with the defendants until liquidation was complete.

Considering the fact that the contract provisions covering the conduct of the business required co-operation of both parties in buying and selling, the use of the word co-operation in Section 11 as to the manner of liquidation of the merchandise, instead of indicating that Costaguta & Company were to be sole liquidators, indicated that the liquidation was to be joint, and that in such liquidation DeRees was to have at least the same powers in selling for liquidation as he had prior thereto, within the scope of the purposes of liquidation, and the powers of all the parties were to be exercised in co-operation.

The word "co-operation" means "joint action; a working together"—Standard Dictionary.

We think that his Honor's conclusion (Rec., p. 225) that lend "his co-operation" "is not appropriate language to describe joint possession" is not sound, certainly as applied to the connection in which it was used in that contract.

We think also that the right to joint possession and joint power of liquidation being one of the fundamental rights of co-partnership, the right should not be taken away by construction based upon implication of words in the contract which do not clearly indicate an intention to confer the sole power of liquidators on one or more to the exclusion of other partners.

His Honor's statement (Rec., p. 225) that "DeRees allowed the firm to conduct the liquidation without protest," meaning in the connection in which he used it, that plaintiff had allowed David Costaguta & Company exclusively to conduct the liquidation without protest for three months, is contradicted by the averments of the bill and supporting affidavits.

It appears from the bill (Rec., p. 19) that from May 1, 1919, to February 15, 1920, the defendant Ottolenghi was in New York in active management of the affairs of David Costaguta & Company in New York.

It appears from the bill (Rec., pp. 63-64, par. XXI) that after the dissolution began, the plaintiff protested to David Costaguta & Company the sales they were demanding he make at a sacrifice. That the plaintiff actually held possession of a considerable part of the merchandise in New York when he became cognizant in January, 1920, of defendants' scheme to transfer the same in fraud of his rights and now holds the same subject to the orders of the Court.

In plaintiff's supporting affidavit (Rec., p. 63) it is set forth that after the termination of the contract plaintiff objected and protested to said David Costaguta & Company against the sacrifice sales being made of the property. In the opposition affidavit of Grumet (p. 152, par. 19) it is denied that Costaguta & Company objected to plaintiff's selling the merchandise in the regular course of trade, as was averred in plaintiff's affidavit, paragraph XXI.

We are utterly unable to see where the Court below can predicate an agreement to make Costaguta & Company sole liquidators upon any alleged acquiescence for four months based upon any competent evidence in the record.

But suppose we were to concede for the sake of the argument that it was intended by the contract to make David Costaguta & Company sole liquidators of the assets of the partnership on dissolution.

> "It is of course competent for the partners by agreement to commit the power of liqui-

dating the partnership business to one or some of their number."

30 Cyc. 660, and cases cited.

Such a commitment, however, does not make the firm assets the assets of the liquidating partner, nor authorize him to convert them to his own use nor to deal with them otherwise than for the purpose of liquidation and in the utmost fairness toward his co-partners, for whom he is thus made a trustee by such agreement.

In *Wade* v. *Rusher,* 4 Bosw. 537 (N. Y. Superior Ct. 1859), a very similar situation to the facts in the case at bar arose. There a suit was brought by one of two partners against the other, joining a third person to whom the defendant partner had fraudulently transferred partnership assets *after the plaintiff partner had released the defendant partner* from liability on the partnership transactions. The suit was for an accounting to set aside the release and to establish the plaintiff's partnership lien on the property fraudulently transferred in order to subject it to the payment of the debt found to be due from the defendant to the plaintiff. The case arose upon demurrer to the complaint and the Court held that the fraudulent transferee of the defendant partner was a proper party in order to charge the property in his hands to the payment of any balance due from the defendant to the plaintiff; that the right to an accounting and an application of the partnership property to the plaintiff's lien, which attached not only to the partnership property, but upon other property into which it may have been converted by the defendant, and not only as against him, but as against all assignees who are not *bona fide* purchasers of it for value. The Court (Bosworth, *Ch. J.*, and Hoffman and Moncrief, *JJ.*) said (p. 545):

> "I apprehend, however, that there are few points in the law of partnership more fully settled than this: that, where real estate has been purchased with partnership funds, each partner has an equitable lien upon it, not only as representing creditors to secure their rights through such lien, but for payment of his own eventual demand. If the title is taken in the name of one, he is a trustee, and the copartner a *cestui que trust*. This equitable lien may always be successfully asserted against the partner, against his heirs, devisees, or his voluntary assignees, and against all except purchasers for value without notice."

In *Hooley* v. *Gieve,* 9 Daly (N. Y.) 104, affirmed on the opinion below in 82 N. Y. 625, a partnership was dissolved by the death of one of the partners under whose will *one* of the surviving partners *was appointed* a trustee by will of the deceased, with direction to withdraw the deceased's interest in the partnership and invest it in a particular way. Contrary thereto the trustees continued the business in a new organization for their own profit, the trust estate being used for that purpose and being commingled with the property of the new firm. The Court held:

> "The entire assets of the firm, subject to the payment of its debts, become impressed with a lien in favor of the representatives of the deceased partner, to the extent of the share of the deceased partner in the firm's assets. The use of such assets in the continuation of the business by the surviving partner constitutes a breach of trust and a misappropriation of such property.
>
> Where, as a result of such continuation of the business, the stock of the old firm has become so blended and intermingled with new stock as to lose its identity, a lien will attach to the whole in favor of the represen-

> tatives of the deceased partner, and to the exclusion of the individual creditors of the surviving partner, except as against a *bona fide* purchaser or a party who has acquired a specific lien by the levy of an execution or attachment.
>
> Upon a breach of trust and a misuse of trust funds, when the identical fund is traced, a prior equity exists in favor of the *cestui que trust* as against creditors of the wrong-doer; and in an action to enforce such equity such creditors are not necessary parties."

It would seem therefore very clear under the authorities that even the making of one or more partners sole liquidators does not divert the other partner's lien on the assets, nor does it authorize the liquidating partners to treat the assets as their own or convey the same away without consideration or for their own benefit.

We come now to the consideration of the other articles of the contract of partnership in the case at bar, which, as we have seen, his Honor Judge Hand construed to destroy, as of the date of dissolution, plaintiff's lien on the *res*.

It will be observed that the contract, after providing for request by notice of liquidation and for co-operation of DeRees in the liquidation, Article 11 then continues (Rec., p. 85):

> "and Messrs. David Costaguta & Co. as sole owners of the business shall pay to Mr. DeRees the amount corresponding to him in installments which are established in the following article."

Then follows:

> "12. In case this agreement is terminated and the preceding article is not applied in so far as it refers to an eventual liquidation

> of the stock in hand *a balance shall be made, observing with regard to deductions the form indicated in Article 5,* and Messrs. David Costaguta & Co. shall take charge of the assets and liabilities, paying the amount which results in favor of Mr. DeRees in four equal installments, the first in cash, and the others in installments of six, twelve and eighteen months, with interest at 6%."

The words "observing with regard to deductions the form indicated in Article 5" refer to *observing* in and at the time of the making of the "balance" the form indicated by Article 5, and they precede the words "and Messrs. David Costaguta & Co. shall *take charge* of the assets and liabilities, *paying* the amount which results," &c. That which *results* from *observing* the form indicated by Article 5 necessarily must be an occurrence following the "observing" of the form indicated in Article 5. This carries the construction back to the form in Article 5, which is (Rec., p. 83):

> "a balance shall be struck and the deductions which it shall be deemed advisable to make in the *merchandise as well as in the credits,* shall be determined by mutual accord between Messrs. David Costaguta & Co. and Mr. DeRees."

We apprehend that the use of the word "form" in Article 12 is equivalent to manner of making as indicated in Article 5. Although the time for making the balance in Article 5 was annually, and therefore not applicable to the time of making the final settlement balance in Article 12, the manner or form of ascertaining it, by making the deductions in the merchandise and credits "by common accord," were to be observed in reaching the balance provided to be reached in Article 12 before "David Costaguta & Co. shall *take charge* of the assets and liabilities, *paying* the amount which results in favor

of Mr. DeRees in four equal installments, the first in cash, and the others in installments of six, twelve and eighteen months with interest at 6%." Moreover, the use of the word "paying" in the present participle form indicates that the paying is contemporaneous with the taking charge.

His Honor Judge Hand, every time he refers to the payment of these installments (Rec., p. 224), overlooks the very material fact that only the last three installments were to be deferred and bear interest, but that the first was to be in *cash*. The word as there used is used as in antithesis to "credit," that is to say, to be a present payment at the time indicated and "not on credit."

Catlin v. Smith, 24 Vt. 85, 86.

The time indicated was when the balance was ascertained in the manner provided by Article 5 after the deductions on merchandise and credits were made by common accord when there had not been a complete liquidation of the assets with DeRees' co-operation under Article 11. The payment of this one-fourth cash installment could only be made after the balance was ascertained, either on complete liquidation under Article 11 of all the assets, or upon ascertainment of the balance by deductions in merchandise or credits by mutual accord under Article 12, and it is only by simultaneously "paying" this cash installment that Costaguta & Company became entitled "to take charge of the assets and liabilities." It is a condition precedent.

This being the only reasonable construction of Article 12, it absolutely fixes the time when Costaguta & Company were to become the "sole owners" under the provisions of Article 11 by taking charge on the establishment of the balance by mutual accord and at least paying the cash balance

and obligating themselves by the mutual accord to pay the deferred installments.

His Honor Judge Hand overlooks the very material point that the mere sale of the merchandise would not render the account as between the partners a liquidated account within the meaning of Article 12, but the credits outstanding were also provided to be liquidated or adjusted between the parties by common accord before any balance could be struck and the right of the plaintiff fixed. It was only when this liquidation of assets was completed with the co-operation of DeRees or adjustment of values made, by common accord, and a fourth of the balance so ascertained paid to the plaintiff, that the partnership lien of the plaintiff was to be released as to the residue and so converted into only a personal claim.

In Article 13 the contract provides that in the case of the death of Mr. DeRees, Costaguta & Company will liquidate the stock on hand within the period of one year from the date of the death, that they will make a balance, pay the heirs of Mr. DeRees the amount which belongs to him in the installments which are indicated in the preceding article, and that interest at the rate of 6 per cent. annually will also be paid to the heirs.

This article provides for a case in which the law itself would cast the liquidation upon the surviving partners, and they were in that case to make the balance. No co-operation in liquidation could be made and therefore it was not provided for. But if a case had arisen under that clause the representatives of the deceased partner could have asserted his lien.

Hooley v. Gieve, 9 Daly 104.

Considered from every standpoint we do not see that there is anything in Articles 11, 12 or 13 of the

contract which can operate to waive or destroy the partner's lien of the plaintiff.

From the averments of the bill it appears that the alien co-partners have without the consent of the plaintiff transferred to this corporation created by them, and for their sole undivided benefit, the major part of the assets in the district, and that they are claiming individual ownership in all the co-partnership assets and they are claiming that no co-partnership exists now or ever existed, and they claim title to all the assets adversely to the co-partnership and asserting complete ownership if the answer to the bill filed by Grumet is to be considered at all on this proceeding.

There are, however, other assets in the district which were not actually transferred to the defendant corporation, to wit, those held by plaintiff subject to the orders of the Court, and the commingled funds held by the alien defendant Taffell, over all of which the Court has jurisdiction of the *res*.

VII.

The Court below erred in holding that under the provisions of the co-partnership contract, plaintiffs had no lien upon the funds of the hosiery section deposited in and commingled with the funds of David Costaguta in banks in New York and New Jersey and traced from those banks into the hides in the district, of the estimated value of from $100,000 to $150,000, and that therefore the Court had no jurisdiction as to said *res*.

In the opinion of the Court below (Rec., p. 226) it is stated:

> "Article Seven (of the contract) clearly shows that the cash was to be kept not by the supposititious firm, but by David Costaguta & Company alone."

An examination of Article 7 (Rec., p. 84) shows that its entire provisions relate wholly to the share of Mr. DeRees in the profits ascertained on the annual accounting provided for each 31st of October by Article 5, and provide that Mr. DeRees could withdraw 50 per cent. of the same, and he was obligated to leave "the balance thereof on deposit with Messrs. David Costaguta & Company drawing an annual interest of 6 per cent."

We have already discussed the purpose of that provision. There is nothing in the contract providing that the funds of the co-partnership should be deposited with David Costaguta & Company.

But in the opinion it is further stated (p. 226):

> "The opposing affidavits assert that the practice of commingling funds had been uniformly followed from the outset."

This was giving weight to the *ex parte* affidavit of Grumet used as an answer to the bill on the merits, to determine the jurisdiction of this Court over the *res*, and in advance of the time when the value of the witnesses' testimony could be sifted by cross-examination. That Grumet could not possibly know anything about the matter except by hearsay, he having been in Europe from before the time of the contract to the fall of 1919, appears from the affidavit of DeRees (Rec., pp. 189-190). We do not think that any weight whatever should have been given to opposing affidavits going to the merits in this proceeding on a question of jurisdiction.

It further appears from plaintiff's supporting affidavit (Rec., p. 199) that soon after plaintiff

came to New York the moneys of the co-partnership were at first kept in his own account, on deposit with Lunham & Moore, in New York, subject to his own check. Also credits were opened in New York by David Costaguta & Company with the American Express Company at New York, subject to be disbursed by plaintiff on orders. Also (Rec., p. 200) plaintiff opened a bank account in which such co-partnership funds were kept in his individual name. Also David Costaguta & Company opened a bank account in the National City Bank in New York City, subject to disbursement by plaintiff in his individual name. That in May, 1918, other bank accounts were opened in New York City in the name of David Costaguta & Company into which the funds collected for merchandise sold in the United States and elsewhere by the plaintiff were deposited.

It is utterly immaterial if in fact the co-partnership funds in Buenos Aires were deposited with some bank there or with David Costaguta & Company, and if they received such deposits, and mixed the fund with other funds, still they were bound under the contract to keep correct books and to account for the moneys of the co-partnership and the mingling of money by a bank or by a co-partner with other moneys of its or his own does not destroy the equitable lien of the true owners of the account over the deposit.

In *Central National Bank* v. *Connecticut Mutual Life Ins. Co.*, 104 U. S. 54, which is a leading case on the following of trust funds in a bank account, this Court quotes with approval from Lord Ellenborough, on the right, as follows:

> "Which is the case when the subject is turned into money and confounded in a general mass of the same description, for equity will follow the money, even if put into a

> bag or an undistinguishable mass, by taking out the same quantity. And the doctrine that money has no earmark must be taken as subject to the application of this rule."

The very point now made by the Court below to defeat its jurisdiction was answered by this Court in that case as follows:

> "But although the relation between the Bank and its depositor is that merely of debtor and creditor, and the balance due on the account is only a debt, yet the question is always open, to whom in equity does it beneficially belong? If the money deposited belonged to a third person, and was held by the depositor in a fiduciary capacity, its character is not changed by being placed to his credit in his bank account.
>
> 'It is,' said *Lord Justice* Turner, in the case of *Pennell* v. *Deffel,* 4 DeG. M. & G. 372, 388, 'I apprehend, an undoubted principle of this court that as between *cestui que trust* and trustee and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust.' "

It is averred in the bill (Rec., p. 23) that these hides located in the district of the value of about $150,000 were acquired by said David Costaguta & Company with the commingled funds of the co-partnership, it having been previously averred (Rec., p. 19) that the funds of the co-partnership had been commingled with the funds of David Costaguta & Company by deposit in certain named banks in New York City and New Jersey. In the supporting affidavit of Miss Saft, the bookkeeper (Rec.,

p. 177), the details of the tracing is fully set out, showing the collection of accounts due the hosiery section aggregating $44,404.16, the deposit of the same in the said bank accounts in New York City and New Jersey, the checking out of said bank accounts by David Costaguta & Company of said moneys and its application by them to the release of attachments on said hides.

It is true that said Grumet attempts in his affidavit to deny this tracing, saying that the money used was the money of said David Costaguta & Company, but he at the same time denies that the said co-partnership ever existed or had any funds. We think that denials of the tracing of the funds belongs to the hearing in chief, when the witnesses can be heard on examination and cross-examination.

The particular banks through which the funds are traced do not have to be in the jurisdiction of the Court, it is sufficient that the property into which it is traced is within the jurisdiction of the Court, to give the Court jurisdiction of the *res*.

Where trust money is used to remove an incumbrance, the lien of the trust attaches to the property.

39 Cyc. 538 and cases cited.

The right to follow a trust fund through a bank account does not depend upon whether the deposit was made lawfully or unlawfully.

39 Cyc. 529 and cases cited.

We insist the Court erred in holding that the plaintiff's partnership lien was lost and, therefore, the jurisdiction did not exist, because the funds were commingled with the funds of David Costaguta & Company in accounts kept in their name in banks.

VIII.

All the requisite elements exist in this cause to give the Court jurisdiction of the subject-matter under Section 57 of the Judicial Code.

In *Goodman* v. *Niblack,* 102 U. S. 556, Mr. Justice Miller, for the Court, said:

> "The purpose of the present bill is to follow this money in Niblack's hands, as a trust fund devoted by Sloo in his lifetime to the payment of the plaintiff's judgment. This trust arises, if it exist at all, out of a deed of assignment made by Sloo of all his property, rights and credits to Benjamin H. Cheever and James Wiles, of the date of February 3, 1860, for the benefit of all his creditors, but with some preferences, among which is the judgment of complainant."

Then after holding that certain non-resident persons were necessary and indispensable parties, he said:

> "This, however, need not defeat the jurisdiction of the court if the bill is amended by making them defendants.
>
> This is a proceeding in equity to enforce a lien on the fund which is within reach of the court, and as the trustees and complainant have the requisite citizenship, section 738 of the Revised Statutes provides a remedy for inability to serve process by an order of publication. If they appear, the suit will proceed as usual. If they do not appear, the decree, so far as it affects the fund in the hands of Niblack, will bind them; and this is all that is necessary to give the court jurisdiction to grant the relief prayed by defendant."

Greeley v. Lowe, 155 U. S. 58-74.

Dick v. Foraker, 155 U. S. 404.

In *Louisville* v. *Nashville & Western Union*, 234 U. S. 369, this Court said (p. 376):

> "We conclude that the provision in Sec. 57 of the Judicial Code, respecting suits to remove clouds from title, was intended to embrace, and does embrace, suits of that nature when founded upon the remedial statutes of the several States, *as well as when resting upon established usages and practice in equity.*"

The case of *Chesley* v. *Morton*, 9 App. Div. (N. Y.) 461, is an exact parallel to the case at bar; it was a suit by the administrator of a deceased partner against a non-resident partner alleging partnership assets in the district, setting up the partnership lien, praying the appointment of a receiver to conserve the assets in the district, and to enforce the rights of the plaintiff, and it went further and demanded an accounting, and for a personal judgment, and its enforcement on the partnership property in the jurisdiction, service on the non-resident by publication under Section 439, Code of Civil Procedure of New York, being invoked "where the complaint demands judgment * * * that an interest or lien in favor of either party be enforced, regulated, defined or limited, or otherwise affecting the title to such property." The Court said (p. 463):

> "The complaint, when scrutinized, will be seen to have two aspects. It seeks to obtain a judgment against the defendant for the amount claimed to be due by him to the firm of Morton & Chesley. In this aspect it is purely personal in its nature. But the demand for a receiver of the partnership effects, with power to sell, shows that more is sought than a merely personal judgment. There can be no doubt that a member of a dissolved partnership has a lien upon its assets.

He is not compelled to rely upon the solvency of his co-partner, but is entitled to the specific application of the joint assets to the payment of the sum due him upon the dissolution (*Lindley on Partnership* [6th Eng. ed.], 358, 542; *Story on Partnership*, Secs. 97, 347; *Taylor* v. *Neate*, 39 Ch. Div. 538). The demand of the receivership and injunction is here made in order to effectuate this lien, and the relief prayed for is justified by the allegations of the complaint.

Regarding the plaintiff's suit in this aspect, that is, as one brought to enforce a lien upon the partnership assets in this State, it comes precisely within the provisions of subdivision 5 of section 438 of the Code, and there can be no doubt that it is an action of the class which may be begun through service by publication. Specific property within the limits and jurisdiction of this State is sought to be subjected to a lien in favor of the plaintiff—one of the actions particularly mentioned in *Pennoyer* v. *Neff* (*supra*).

But one further question remains to be considered. The plaintiff demands a greater measure of relief than could be given him in an action begun without personal service of the summons. Is it essential to the granting of the order that the action, in all its aspects, be maintained here? We think not. Section 439 of the Code requires the complaint to show 'a sufficient cause of action against the defendant to be served.' This the present complaint does. It demands a measure of relief which the court is competent to grant, together with more which it is not. It frequently happens, however, especially in equity suits, that more is asked than the facts proved permit the court to grant. This, however, is no obstacle to the rendering of the decree to which the plaintiff is entitled. The plaintiff, if he proves his case, is entitled, *secundum allegata et probata*, to the application of the New York

assets to the payment of his claim, and this right is 'a sufficient cause of action against the defendant' within the meaning of section 439. *Porter Land & Water Company* v. *Baskin* (43 Fed. Rep. 323), decided under the California Civil Code, is an authority on this point. The defendant denies that there are New York assets, but this is not the time to try that issue. It is the complaint (Sec. 439) which must determine whether a sufficient cause of action exists. If the plaintiff has stated in his complaint what he will be unable to prove at the trial, he will pay the usual penalty."

Cases Distinguished.

YORK CO. SAVINGS BANK v. ABBOTT, 139 F. 988.

The question in that case was whether, under the terms of a lease and certain options therein, the lessee acquired any lien or interest in the property at the termination of the term such as would give jurisdiction to the then United States Circuit Court to bring in the non-resident lessor by publication under Section 8 of the Act of 1875.

The lease of a store lot executed in 1867 is set out in the opinion. It was for a term of twenty-five years at an annual rental of $450 and payment of taxes, the lessee to erect and maintain a store thereon during the term. Then follow certain options arising at the end of the term which are given to the lessor alone.

(1) The *lessor* "shall have *the privilege* of extending the lease by a perpetual lease forever to the lessee or his assigns at the above described rent and taxes."

(2) Or *"if the lessor* or his assigns or representatives prefer, they may have an appraisal of the *lot* and *building* thereon, *with the option on their part* of purchasing *such buildings* at such appraised value *or* of selling to the lessee or his repre-

sentative the lot at such appraised value, whichever the lessor, his assigns or representatives may elect."

(3) "And the lessee doth hereby covenant for himself, his heirs and representatives, to purchase said lot at such appraisal, or to convey said building to the lessor or his representatives according to the *decision and election* of said *lessor* or his representatives, or to execute and complete a perpetual lease of said lot, as before stipulated, at the end of said term, *if* the lessor or his representatives shall demand such lease."

An examination of the above terms show conclusively that all the options which were contracted for were reserved exclusively by the lessor if he elected to exercise any. The lease was for a definite term. The lessee had no right to demand a longer term, but the lessor was given the right *if* he demanded it. The option to purchase the building at the end of the term was reserved to the lessor, but the obligation to so purchase was not imposed on him. The option to sell the lot at an appraised value was reserved to the lessor, and the obligation to purchase was put on the lessee only *if* the lessor exercised the option to sell. As plainly stated in the lease, these options were given to the lessor as a privilege which was reserved to him and his representatives or assigns at the end of the term, but none of which he was under any obligation to exercise.

The bill was brought by the lessee, after the term, alleging in substance that the lessor or his assignee, Mrs. Abbot, the non-resident, had not exercised any of these options, and refused to exercise them, and prayed the Court to appoint a master to exercise that option for her, make conveyances, etc. The Court ruled that the plaintiff set up no right, interest or lien in the property within the meaning of

Section 8 of the Act of 1875. Putnam, *J.*, said (p. 993):

> "While in some of the cases determined by that Court (U. S. Supreme Court) the rights of an absent defendant who has not appeared have been effectually disposed of, in none of them has any *mere personal* act on the part of the absent defendant been a necessary element."

And the Court dismissed the case for want of jurisdiction.

In that case there was no challenge of the right of plaintiff to remove, at the end of the term, the store erected on the land, nor was there any allegation that the lessor had exercised any of the options reserved to the lessor, whereby, if exercised, a correlative right would then and not till then spring up in the lessee, but the equity set up was to make the lessor exercise a personal privilege reserved to her by the contract or have the Court do it for her, whereby, if exercised, a right of purchase or to a perpetual lease might then come into existence. It was, of course, the duty of the Court to see that the bill on its face set up an existing title or lien on property in the district, and as the averments of the bill did not do that, no other decision could be reached. The bill set up no cause of action on its face, and, much less, the existence of any title or lien upon property, and was a bare assertion of a claim without legal attributes. The case at bar possesses no such infirmities.

JONES V. GOULD ET AL., 149 F. 153, C. C. A., 6TH CIRCUIT.

There the syndicate contract was construed by the Court to be one of partnership with specified powers vested in managers to build and to buy railroads,

stock in railroads, purchase coal, lands, etc. The bill charged mismanagement by the managers and breaches of trust by wrongful acts which resulted in serious loss and damages to other subscribers and to the plaintiff. The prayers were for injunction to restrain the managers from doing certain specified things in the management of the syndicate, for a receiver and for sale of the assets, the payment of its debts and the distribution of the net proceeds to the subscribers.

The only averment in the bill which attempted to localize the action in the Southern District of Ohio was an averment that the syndicate owned stock in two Ohio corporations, which were made parties defendant, but no relief was prayed against them, and the other defendants, citizens of other states, were sought to be brought in by publication.

The Court, holding that the case was not within the Federal Statute for substituted service, distinguished the case from the *Jellenik* case (177 U. S. 1) and said:

> "For here there was no controversy about the ownership of the stock, as in that case, or without any lien or claim to it, or about any cloud or incumbrance upon it. The controversy raised by the bill is over the management of the business and affairs of the railroad companies by the managers, such as their expenditure of large sums of money in grading parts of the road, and not completing them, 'whereby the grading is going to ruin,' the failure to effect proper and advantageous connection with other railroads, and the like. Upon the allegations of such mismanagement it is charged that there is such a breach of the syndicate agreement and of the duties of the managers as justifies the dissolution of the compact and a closing up of the enterprises which the subscribers undertook. We are therefore of opinion that

> the case was not one in which the court could acquire jurisdiction of the defendants by the extraordinary service of process prescribed by the statute referred to."

The case is distinguished by the fact that it was a suit to declare a breach of contract by managers as justification for its termination and for winding up a syndicate agreement and distribution of assets before the time fixed by contract for dissolution, and no assertion of any individual property right in the stocks in question was made other than might rise *upon a decree* of dissolution of the syndicate or partnership. It was not a suit to enforce an existing choate lien, but to enforce a lien to be created by the suit. This is the interpretation put upon that decision in *Wabash* v. *Westside R. R.*, 235 Fed. 648. No wrongful act is charged relative to the transfer of the stocks in question or relief to reclaim it. The jurisdiction was sought to be predicated solely upon the fact that the syndicate possessed stock in corporations in the district.

It was not a case like the one at bar, where the partnership is already in process of liquidation, where a large part of the assets are alleged to have been transferred illegally to a corporation in this district, without consideration, except that all of its stock was transferred to and is being held by one partner in his own name and in his own right, and where the relief sought is to subject that stock and other assets of the partnership in the jurisdiction, specifically pointed out in the bill, to the plaintiff partner's lien and for partition of the partnership assets in this jurisdiction.

IX.

The District Court had no jurisdiction, on constitutional grounds, on the motion for interlocutory relief or motion to vacate service or order for service by publication, to dismiss the plaintiff's bill for alleged want of jurisdiction.

The constitutional principle invoked against the exercise by the Court of the power to dismiss the bill, in part on *ex parte* affidavits in opposition to the jurisdictional averments of the bill, in the manner and form in which it was done, raised and raises a constitutional question not merely incidentally collateral to the general jurisdiction of the Court derived from the Constitution, but which goes to the power of the Court to deprive the plaintiff without due process of law of his right of property in the suit, by a procedure which deprived him of such right. The constitutional question goes to the marrow of the jurisdictional question, and we think that the Court has plenary jurisdiction over the whole case under Section 238 of the Judicial Code. We know of no decision of this Court which expressly covers this matter, unless it may be inferred either positively or negatively by the case of *Filhoil* v. *Torney*, 194 U. S. 357.

A constitutional question may become "involved" or "drawn in question" by the decision or action of the Court as well as by the acts of the parties (*Chappell* v. *U. S.*, 160 U. S., 499, 507, 509), and if it exists it is immaterial whether there is or not a certificate as to the jurisdiction, so far as investing this Court with plenary power to review the entire case. The constitutional question being paramount, the limitation on review is not opera-

tive, certainly not where the one involves the other. The limitation is operative only where there is a jurisdictional question and questions other than constitutional ones involved.

We are cognizant of the existence in Section 37 of the Judicial Code of the provision:

> "If in any suit commenced in a district court, * * * it shall appear to the satisfaction of the said district court, at any time after such suit has been brought * * * that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court * * * the said district court shall proceed no further therein, but shall dismiss the suit, &c."

But that provision is substantially the same as far as applicable as that in the Act of 1875, 18 Statute at Large, Chapter 137, Section 5.

In *Hartog* v. *Memory*, 116 U. S. 588, the bill had pleaded a proper diversity of citizenship to make a case of a suit between an alien and a citizen of Illinois, to give the Court jurisdiction, and there was no plea by the defendant to the jurisdiction.

In taking evidence on the merits the defendant offered himself as a witness, and incidentally replied to a question of counsel that he was a citizen of Great Britain, which if true would make a case of a suit between aliens of which the Court would not have jurisdiction. A verdict was rendered for plaintiff, whereupon the defendant moved to dismiss the suit for want of jurisdiction, which motion the Court granted without any other proceedings or evidence, basing it upon Section 5 of the Act of 1875. On appeal this Court reversed the lower Court. This Court said (p. 590):

> "Neither party has the right, however, without pleading at the proper time and in the proper way, to introduce evidence the only purpose of which is to make out a case for dismissal."
>
> "The case is not to be tried by the parties as if there was a plea to the jurisdiction, when no such plea has been filed. The evidence must be directed to the issues, and it is only when facts material to the issues show there is no jurisdiction that the Court can dismiss the case upon the motion of either party."

And (p. 591):

> "Beyond this, no doubt, if, from any source, the Court is led to suspect that its jurisdiction has been imposed upon by the collusion of the parties or in any other way, it may at once of its own motion cause the necessary inquiry to be made, either by having the proper issue joined and tried, or by some other appropriate form of proceeding, and act as justice may require for its own protection against fraud or imposition.
>
> But the evidence on which the Circuit Court acts in dismissing the suit must be pertinent either to the issue made by the parties, or to the inquiry instituted by the Court."

In the case at bar there was no plea to the jurisdiction, but the motions pending were the motion of plaintiff for interlocutory relief and the motions of defendants to vacate entries of service and to vacate an order for service by publication on alien defendants, because it was alleged that the suit was not an action to enforce any legal or equitable lien, etc., on property within the district (Rec., pp. 128 and 122). If there had been a plea to the jurisdiction, on the trial of the issues of

fact, the plaintiff would have had the constitutional right to examine and cross-examine the witnesses.

Turpin v. Lemon, 187 U. S. 51-58.
Hurtado v. California, 110 U. S. 16-539.

We frankly admit that if the want of jurisdiction over the subject-matter and *res* was in the opinion of the Court apparent upon the face of the bill, without considering evidence *de hors* the bill, it would have been within the jurisdiction of the Court to make an order on this hearing as on demurrer dismissing the bill.

We go further and admit that the literal translation of the contract of partnership annexed to the moving affidavit of plaintiff, and the agreed translation, could properly be considered by the Court as a part of the case made by the bill on the question of jurisdiction. But we insist that the Court could not decide the jurisdictional question and dismiss the bill by basing its decision in part on the contract and in part on alleged construction of clauses of the contract by acts of the parties based upon the fact (Rec., p. 226) that "the opposing affidavits assert that the practice of commingling funds had been uniformly followed from the outset," etc., and concluding that by the contract so interpreted the lien did not exist, and also (Rec., p. 225) that an estoppel existed against the plaintiff by alleged acquiescence for three months in their being the sole liquidating partners, all based upon *ex parte* affidavits received without an opportunity to plaintiff of cross-examining these witnesses.

It is true that these statements appear in that part of the opinion which deals with the issues made by the alleged special appearances in opposition to the plaintiff's motion for appointment of a receiver,

injunction, etc. It is also true that his Honor introduces that portion of his opinion in which he deals with the "motion to dismiss the service and vacate the order for substituted service" (Rec., p. 227) with the statement, "This question must be decided upon the bill alone." But he did not hold to that limitation. For the purpose of determining the question he assumes that his previous finding, based upon the *ex parte* opposition affidavits, to the effect that Costaguta & Company were sole liquidators, was an established fact, and used the assumption as an element in determining his construction of the other articles of the contract. He says (p. 228):

> "However, this contract, always assuming it to create a partnership, is not of the usual kind. It permits *the liquidating* partner, as I have said, to take over all the assets as sole owner," etc.

And (p. 229):

> "The liquidating partner might deal as he pleased with his own so long as the transfer left him solvent."

Moreover, he bases the alleged want of jurisdiction over the commingled funds in Taffell's hands, and that diverted into the hides, upon the alleged practice set up in the *ex parte* opposition affidavits of commingling funds.

We concede that the Court would have had jurisdiction to deny interlocutory relief on such *ex parte* affidavits, without dismissing the bill, but in such case the plaintiff would have had the right of review in the Circuit Court of Appeals on the interlocutory order. The Court, while denying interlocutory relief, could also have made a suitable order providing that an issue be made on the ques-

tion of jurisdiction of the *res*, and that testimony be taken under examination and cross-examination, and upon consideration thereof the Court would have had jurisdiction to dismiss the bill. But in the manner in which it proceeded it deprived plaintiff of due process of law and his constitutional right to invoke the jurisdiction of the Court for protection of his property right, and thus it was without jurisdiction to dismiss the bill upon the *ex parte* evidence it did so receive and consider. All these objections were made by the plaintiff to the proposed form of decrees before they were entered (Rec., p. 230), and the action of the Court therein was assigned as error in our assignments of error (Rec., p. 253), filed with the petition for appeal.

Wherefore it is prayed that the said decrees be reversed and that this Court will give such directions as will, if possible, right the appellant's wrongs, which, by reason of the mistaken view of the Court as to its jurisdiction, it has suffered.

Respectfully submitted,

ERWIN, FRIED & CZAKI,
Appellant's Solicitors.

MARION ERWIN,
FREDERICK M. CZAKI,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 931. 341

HENRY S. DE REES,
Plaintiff-Appellant,

against

DAVID COSTAGUTA, MARCOS A. ALGIERS, ALEJANDRO SASSOLI, EUGENIO OTTOLENGHI, individually and as co-partners in business composing the co-partnership of David Costaguta & Company, RENADO TAFFELL and the AMERICAN-EUROPEAN TRADING CORPORATION,
Defendants-Appellees.

BRIEF OF SOLICITORS FOR DEFENDANTS-APPELLEES.

WALTER H. MERRITT,
Solicitor for non-resident defendants David Costaguta, Marcos A. Algiers, Alejandro Sassoli, Eugenio Ottolenghi, individually and as co-partners in the business of David Costaguta & Company, appearing specially herein.

A. DELAFIELD SMITH,
Solicitor for resident defendants, Renado Taffell, and the American-European Trading Corporation, appearing specially herein.

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HENRY S. DE REES,
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against

DAVID COSTAGUTA, MARCOS A. ALGIERS, ALEJANDRO SASSOLI, EUGENIO OTTOLENGHI, individually and as co-partners in business composing the co-partnership of David Costaguta & Company, RENADO TAFFELL and the AMERICAN-EUROPEAN TRADING CORPORATION,
Defendants-Appellees.

BRIEF OF SOLICITORS FOR DEFENDANTS-APPELLEES.

As is stated on page 1 of his brief, the plaintiff-appellant seeks to maintain this appeal directly to this court under Section 238 of the Judicial Code from decrees of the United States District Court for the Southern Distr[illegible]of New York (Rec., pages 241, 244), dismissing the complai[illegible] as against the several defendants. The certificate of the Honor-

able Learned Hand, District Judge (Rec., page 251) attached to the order, allowing appeal (Rec., page 247) is as follows:

> "The plaintiff having entered his appeal to the Supreme Court from the decrees of this court entered the 10th day of April, 1920, vacating the order for service by publication on the non-resident defendants, and the service of subpoena on all the defendants, and dismissing plaintiff's bill as more particularly set forth in said decrees,
>
> I HEREBY CERTIFY that said decrees were entered solely because the case as made by the bill did not set forth a legal or equitable claim to or lien on the property in the district, of which this Court would have jurisdiction within the meaning of Section 57 of the Judicial Code, or in which this court could render a judgment otherwise than a judgment *in personam* against the non-resident aliens who appeared specially and objected to the jurisdiction of the Court."

If this court has jurisdiction of the appeal the question of the jurisdiction of the court below, alone, will be reviewed (Judicial Code, Section 238), although the plaintiff-appellant, in Point IX of his brief (Plaintiff-Appellant's Brief, page 84) seeks to raise a Constitutional question involving the "Jurisdiction" of the District Court, "on constitutional grounds * * * to dismiss the plaintiff's bill."

Statement.

The plaintiff-appellant has reveiwed the case at such length that the defendants-appellees need only briefly outline the proceeding.

On March 10, 1920, the plaintiff-appellant, alleging himself to be a resident of the State of New Jersey, filed in the United States District Court for the Southern District of New York a bill of complaint against David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi, composing the firm of David Costaguta & Company, alleging them to be aliens and residents of the Republic of Argentine, South America, joining with them as parties defendants the American-European Trading Corporation and Renado Taffell, residents of the Southern District of New York. The bill of complaint alleges that the plaintiff entered into a certain contract in writing with the said firm of David Costaguta & Company, which contract the plaintiff contends constituted a partnership between himself on the one hand and the said firm of David Costaguta & Company on the other hand. The pleader sets forth in the bill of complaint what he deems to be the "substance and effect" of the contract. (See paragraph Eleventh of the Bill of Complaint; Record, pages 5-11). The plaintiff-appellant concedes (plaintiff-appellant's brief, pages 10, 87) that he "is bound by the terms of the contract" as set out in the translation of the same (Record, page 82). The plaintiff further aleges that because of certain differences arising between the parties he elected to terminate the said contract as of November 22, 1919; that he demanded a liquidation of the merchandise on hand, an accounting and detailel statement of the transactions

of the business of the alleged co-partnership and payment of certain moneys claimed to be due him (Record, fols. 49-52), with which demand he alleges the firm of David Costaguta & Company failed to comply; that on or about the 31st day of January, 1920, the firm of David Costaguta & Company caused the American-European Trading Corporation (one of the other defendants in this action) to be organized under the laws of the State of New York (Rec., page 21, fol. 62); and that said firm caused certain assets of the alleged co-partnership to be transferred to such corporation, in fraud of the plaintiff-appellant, the major part of which consisted of certain hides, of the alleged value of one hundred and fifty thousand dollars, claimed to have been bought by the firm of David Costaguta & Company with the commingled funds of the alleged co-partnership, which assets were within the territorial jurisdiction of the Southern District of New York (Rec., pages 22, 23). The plaintiff prays for the following relief (Rec., pages 26 to 30):

FIRST.—That the alleged co-partnership arising out of said contract "be declared dissolved, and that all of the property, assets and effects thereof wheresoever situate, lying and being, be liqudated, sold and disposed of and converted into cash," etc. (Rec., fol. 76).

SECOND.—That the non-resident defendants, comprising the firm of David Costaguta & Company "account to the plaintiff for all their acts, conduct and transactions in and about the business of said co-partnership, to the end that it be established, what, if any, sum or sums there be and remain due and unpaid to the plaintiff from said David Costaguta & Company, in and about the business and

transaction" of the alleged co-partnership, etc. (Rec., fol. 77).

THIRD.—"That the plaintiff be decreed to have a lien upon all of the property, assets and effects of the defendants David Costaguta, Marcos Algiers, Alejandro Sassoli and Eugenio Ottolenghi, individually and as partners, composing the firm of David Costaguta & Company, and on all of the property, assets and effects of the American-European Trading Corporation, into which the co-partnership assets have been converted, or with which the said assets have been commingled," etc. (Rec., fols. 78, 79).

FOURTH.—That a receiver *pendente lite* be appointed herein of all of the property, assets and effects, of whatever kind, character, nature or description and wheresoever situated, of the co-partnership composed of the plaintiff and the partnership of David Costaguta & Company, and of all of the property, assets and effects of the partnership of David Costaguta & Company * * * which are or have been commingled with the assets of said co-partnership * * *" (Rec., fol. 80).

FIFTH.—"That the plaintiff and each and all of the defendants herein, their agents, servants and employees, and each and every other person, firm or corporation, having possession, custody or control of any of the property of said co-partnership, or property of any of the defendants, be directed to deliver the same to the receiver" and be restrained and enjoined from transferring or making any disposition of such property (Rec., fol. 83).

SIXTH.—"That a temporary restaining order be issued herein, which shall provide that the said

David Costaguta, Marcos Algiers, Alejandro Sassoli, and Eugenio Ottolenghi, individually and as co-partners composing the firm of David Costaguta & Company * * *, the American-European Trading Corporation, its officers, agents, servants and employees, or any other person, firm or corporation having possession, custody and control of any of the property of the co-partnership composed of the plaintiff and the said David Costaguta & Company, or having possession, custody and control of the property of the said defendant the American-European Trading Corporation, be and they hereby are jointly and severally enjoined and restrained, pending the hearing and determination upon the return of a rule *nisi*, from in any manner or form whatsoever, interfering with, assigning, transferring or disposing of or of removing from the jurisdiction of this court any property of any kind, character, nature or description whatsoever and wheresoever situate belonging to the defendants or either of them or belonging to the said co-partnership" (Rec., fols. 84 to 86).

At the time of the filing of the bill of complaint the plaintiff-appellant procured an order or rule *nisi* (Rec., page 37) requiring the defendants to show cause why an order should not be made directing (1) that such a receiver *pendente lite* be appointed; and (2) that the plaintiff and the defendants transfer to such receiver the property of the alleged co-partnership held by them, and enjoining them from dealing in any manner with the property otherwise than to deliver the same to such

receiver. The rule *nisi* also contained a temporary restraining order effective pending the hearing of the motion.

No subpoena or other process has been served on the non-resident members of the firm of David Costaguta & Company but the subpoena and order for rule *nisi* were served on the resident defendants, the American-European Trading Corporation and Renado Taffell. (Rec., pages 34, 35). Thereafter, on March 16th, the plaintiff procured an order for service upon the non-resident defendants by publication, in the method prescribed by Section 57 of the Judicial Code (Rec., pages 112 to 114).

Thereafter, on March 23, 1920, Walter H. Merritt, as attorney for the non-resident defendants, David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi, individually and as co-partners in business composing the co-partnership of David Costaguta & Company, filed a special appearance solely for the purpose of applying to the Court for an order vacating, quashing and setting aside the said order for the service by publication of the subpoena upon the said defendants (Rec., pages 118-120), and procure an order (Rec., pages 124-128) from Honorable Learned Hand, D. J., requiring the plaintiff to show cause why an order should not be made vacating, quashing and setting aside the said order as made and for the service by publication on the non-residents, and also vacating, quashing and setting aside certain alleged services of the subpoena upon the alleged agent of the firm of David Costaguta & Company within the Southern District of New York.

The hearing on this order to show cause came on before the Honorable Learned Hand, D. J., simultaneously with the hearing of the rule *nisi* obtained by the plaintiff.

Esselstyn & Haughwout on March 19, 1920, filed a special appearance in behalf of the defendants American-European Trading Corporation and Renado Taffell for the purpose of objecting to the jurisdiction of the United States District Court and for the purpose of opposing the plaintiff's motion on the return of the rule *nisi*. (Rec., pages 116, 117).

After hearng the motions, Honorable Learned Hand, D. J., denied the plaintiff's motion for an injunction and receivership and granted the non-resident defendants' motion to vacate the said order for substituted service. As stated in the opinion of the court (Rec., page 229, fols. 686, 687) the quashing of the order for substituted service necessarily resulted in the dismissal of the plaintiff's bill and final decrees were thereupon signed and entered embodying these decisions and dismissing the bill of complaint. The plaintiff thereupon prepared his papers for this appeal direct to this court under Section 238 of the Judicial Code, claiming a right to have reviewed the decision of the court below on the question of jurisdiction.

The questions presented by the defendants-appellees are as follows:

(a) The case is not one in which the jurisdiction of the District Court is in issue within the meaning of Section 238 of the Judicial Code and therefore the appeal should be dismissed.

(b) The contract which is the basis of the bill of complaint negatives the right of the plaintiff-ap-

pellant to the assertion of any lien upon or interest in any property within the jurisdiction of the Southern District of New York.

POINT I.

The case is not one in which the jurisdiction of the District Court is in issue within the meaning of Section 238 of the Judicial Code and therefore the appeal should be dismissed.

The first question to be determined is the jurisdiction of this court to hear the appeal. In the case of Fore River Shipbuilding Co. vs. Hagg, 219 U. S., 175, at page 177, Mr. Justice Day said:

> "This court takes notice of its own jurisdiction, and whether the question is raised by the counsel or not, inquires of its own motion whether there is jurisdiction to entertain any given case before it. Mansfield, Coldwater & Lake Michigan Ry. vs. Swan, 111 U. S., 379-382."

To the same effect see also:

> Swift & Co. vs. Hoover, 242 U. S., 107;
> Empire State-Idaho Mining Co. vs. Hanley, 205 U. S., 225.

The statute (§238 of Judicial Code) means to give a review, not of the jurisdiction of the court upon general grounds of law or procedure, but of the jurisdiction of the court as a federal court.

Fore River Shipbuilding Co. vs. Hagg, 219 U. S., 175;
Louisville Trust Co. vs. Knott, 191 U. S., 225;
Bache vs. Hunt, 193 U. S., 523;
Blythe vs. Hinckley, 173 U. S., 501;
Ill. Central R. R. Co. vs. Adams, 180 U. S., 28, 35;
Scully vs. Bird, 209 U. S., 481.

Whether upon the showing in the bill, the plaintiff-appellant is entitled to the relief sought, is not a jurisdictional question in the sense of Section 238 of Judicial Code.

Smith vs. McKay, 161 U. S., 355;
Louisville & N. R. Co. vs. Western Union Tel. Co., 234 U. S., 369, 372;
Public Service vs. Corboy, 250 U. S., 153, at 162;
Illinois Cent. R. R. Co. vs. Adams, 180 U. S., 28, 35;
Darnell vs. Ill. Cent. R. R. Co., 225 U. S., 243.

In the case of Public Service vs. Corboy, supra, at page 162, the court said:

"The arguments at bar pressed upon our attention considerations based upon the assumed application of general principles of comity, but as on this direct appeal we have power alone to consider questions of the jurisdiction of the court below as a federal court, they are not open to our consideration (Louisville Trust Co. vs. Knott, 191 U. S., 225). This, moreover, puts out of view the argument advanced concerning the adequacy of the aver-

ments of the bill to justify relief, since that subject necessarily, for the reasons stated, must be left to the consideration of the court below when it exercises jurisdiction of the cause."

In the present case, the plaintiff claiming to be a partner with the non-resident partnership of David Costaguta & Company, in addition to his prayer for an accounting upon the termination of the alleged co-partnership, prays that he may be decreed to have a lien on certain assets within this jurisdiction and asks that a receiver be appointed to administer them (Rec., fols. 78 to 82). There is no controversy that certain assets mentioned in the bill of complaint are within the territorial jurisdiction of the United States District Court for the Southern District of New York. This distinguishes the present case from Chase vs. Wetzlar, 225 U. S., 79. While there might be some question as to whether an action brought to establish and enforce a so-called partner's lien is the kind of action contemplated by Section 57 of the Judicial Code, under which the plaintiff purported to proceed, this is not the objection raised to the bill of complaint nor the basis of the court's decision. The point made by the defendants before the District Court was that although the bill of complaint may have specifically demanded the relief comprehended in Section 57 of the Judicial Code, the allegations of fact in the bill of complaint clearly negatived the complainant's right thereto. This is true because the contract (Rec., pages 82 to 86) which forms the basis of the complaint shows upon its face that the plaintiff was not a partner with the firm of David Costa-

guta & Co. and that, even assuming that it could be so construed, it relegated the plaintiff to rights *in personam,* as he gave up any right to receive a share in the assets as such of the co-partnership, agreeing to accept any amount due him in certain fixed instalments.

That this was the basis of the court's action in the vacating of the order for substituted service and dismissing the bill of complaint clearly appears from a reading of the opinion of the court (Rec., fols. 681-687, pages 227-230):

> (Fol. 683.) "If the liquidation included turning over to the plaintiff his share of the assets when converted into cash, I should agree that his lien, as it is generally called, entitled him to protection of those assets in the hands of the liquidator, and that he could by a suit under Section Fifty-seven of the Judicial Code, follow the assets and insist upon their sequestration by a court, not of course for delivery to him, but at least to await the statement of the accounts and distribution in accordance therewith * * *" (fol. 686). "In no event could the plaintiff ever receive any share in the assets as such, for in either case he is confined to his rights *in personam* against the firm upon their undertaking to pay in instalments his share as eventually settled by liquidation. The only excuse for allowing him to proceed *in rem* would be his right to insist at some time upon the application of this particular property to that payment at some future time, a right which at no time can he possess. I am of course aware that this dis-

position would end the case in this jurisdiction, but that is precisely the result which I think should follow. There seems to me to be no excuse for compelling these defendants to litigate here what should be settled in Argentina, or from impeding them in the settlement, which is progressing, so far as I can see, quite in accordance with their agreement."

The objection was taken precisely in the same manner as in the case of *Gage* vs. *Riverside Trust Co.* (Circuit Court, So. Dist. of California), 156 Fed., 1002, and in the case of Jones vs. Gould (Circuit Court of Appeals, Sixth Circuit), 149 Fed., 153. In the first case, Judge Wellborn said, page 1003:

"Certainly substituted service would not be wise in a case where the bill, although specifically demanding the relief mentioned in the statute, clearly negatived complainant's right thereto; and it seems to me, after careful consideration of the statute, its phraseology and manifest purpose, that such service ought not to be had in any case unless the complainant affirmatively shows his right to the relief, which alone justifies the service."

Of course, if the plaintiff had set forth in his complaint allegations of fact which supported a right to the lien or claim which he attempts to assert by the bill, he might enforce it against the property in the manner and to the extent laid down by the controlling statutes in the jurisdiction wherein the property was situated, but in the

present case, the allegations of fact in the bill negatived the existence of any such lien.

It thus appears that the controlling statutes of the particular jurisdiction in which the plaintiff filed his bill of complaint are immaterial to the court's decision. The principles which the court invoked in dismissing the complaint would result in its dismissal by the tribunals of any sovereign. The argument of Mr. Justice Day in the case of Fore River Shipbuilding Company vs. Hagg, 219 U. S., 175, is applicable. In that case the plaintiff, a citizen of Sweden, sued a Massachusetts corporation in the Federal Court in that District to recover damages under a penal statute of the state of Massachusetts. This court said (page 179):

> "It was a question to be decided upon the application of the same principles as would apply had this action been brought in a court of any other state or nation. Whether other sovereignties would enforce penal actions of the character alleged to have arisen under the Massachusetts statute was not a question peculiar to the federal jurisdiction of the court. It was general in its nature and to be determined upon principles controlling in other courts as well as those of federal creation."

Apparently the plaintiff-appellant, aware of his error in appealing directly to the Supreme Court, has sought to sustain his appeal under Section 238 by introducing a Constitutional question to the effect that the court deprived him of the property right in his action without due process of law, by considering evidence de hors the bill upon a general question of jurisdiction. One of the principal ob-

jections to this contention, irrespective of its merits, is that the case itself does not in any sense involve a Constitutional question. To quote from Empire State-Idaho Mining Co. vs. Hanley, 205 U. S., 225, at page 232:

> "It has been repeatedly said that it is only when the Constitution of the United States is directly and necessarily drawn in question that such an appeal can be taken, and *the case must be one* in which the construction or application of the Constitution of the United States is involved as controlling" (Italics ours).

The court in the present case stated at the outset of that part of its opinion which dealt with the order for substituted service and the consequent dismissal of the bill that it was deciding the question solely on the allegations of the bill of complaint. We believe it to be apparent upon a careful reading of the opinion, that the court considered nothing that did not appear upon the face of the bill of complaint.

POINT II.

The contract, which is the basis of the bill of complaint, negatives the right of the plaintiff-appellant to the assertion of any lien upon or interest in the property within the jurisdiction of the Southern District of New York.

As previously stated what the plaintiff-appellant claimed to assert by his bill of complaint was

the so-called partner's lien as defined by the common law. The existence of such a lien involves two conclusions: (A), that the plaintiff was a partner and that the specific property against which the lien is sought to be enforced was partnership property in whole or in part, and (B), that the terms of the partnership agreement dealing with the possession of the partnership property and the liquidation of the business were consistent with and showed the partner to be entitled to the assertion of such a lien. The basis of the plaintiff's claim is the contract which he had with the firm of David Costaguta & Company. This was paraphrased by him in the bill of complaint, but the plaintiff states on page 10 of his brief as follows:

> "A correct decision of the questions involved largely turns upon that contract.
>
> We conceive that the plaintiff is bound by the terms of the contract as set out in the said translation in matters, if any, in which there is a conflict between the written translation and the allegations of the bill as to the substance of the contract in any particular (We know of no such conflict)."

And on page 87 of his brief says:

> "We go further and admit that the literal translation of the contract of partnership annexed to the moving affidavit of plaintiff, and the agreed translation, could properly be considered by the court as a part of the case made by the bill on the question of jurisdiction."

In considering the contract we shall, therefore, consider the language of the translation agreed

upon by counsel (Rec., page 82) in place of the language in which it is expressed in the bill of complaint, it being admitted that the contract itself is, or, at least, is to be treated as part of the bill of complaint.

A.

The question as to whether or not there ever was a partnership relation, as claimed, must depend upon the intent of the parties as expressed in the agreement which they made. As stated by Mr. Justice Harlan in Paul vs. Cullum, 132 U. S., 539, at page 551:

> "Persons cannot be made to assume the relation of partners, as between themselves, when their purpose is that no partnership shall exist. There is no reason why they may not enter into an agreement whereby one of them shall participate in the profits arising from the management of a particular property without his becoming a partner with the others, or without his acquiring an interest in the property itself, so as to effect a change of title."

As is often the case in a contract such as is involved here, the opening paragraph reveals the intent of the parties as to the nature of their relationship. This paragraph is as follows:

> "Messrs. David Costaguta & Co. establish in their own House a special section which will be called 'Hosiery Section,' for the purchase and sale of hosiery in general and other articles of knit goods or any other line of

goods, which by common accord it is agreed to exploit, authorizing Mr. De Rees to manage the section."

In other words, David Costaguta & Co. agreed to open "in their own house" a "special section" or department, "authorizing Mr. De Rees (plaintiff-appellant) to manage the section." It is to be noted that the section is established by David Costaguta & Company in their own house, not by David Costaguta & Company in conjunction with the plaintiff. The arrangement thus contemplated was the usual case of a large department store opening up a new department and entering into a contract with some one to manage the same. No words in this paragraph can be construed as implying that the plaintiff was to be other than an employee of the firm. This understanding is confirmed by the sections which follow. Paragraphs 2 and 3 show that the plaintiff was merely to make the necessary purchases within certain limits and to sell the same upon such terms and conditions as should be fixed by the firm of David Costaguta & Company.

Paragraph 4 shows that all overhead expenses were to be borne by the firm, a provision only consistent with the firm's sole ownership of the business. From this and the following paragraphs it is to be noted that the employees paid by David Costaguta & Company were to keep the accounts, a balance being struck each year, to determine profit or loss. The remuneration of Mr. De Rees is fixed as 45% of the net profits, but, as provided in paragraph 7, 50% of this amount was to remain with David Costaguta & Company on deposit

for his account. As shown by paragraph 8, the purpose of this latter provision was to furnish security against a breach of his agreement, David Costaguta & Company being entitled to retain the profits of any fiscal year in which a violation on the part of the plaintiff may have occurred.

B.

Assuming for the purpose of argument that the contract creates a co-partnership, the case is not one in which the general law is controlling as to the method of liquidation and the rights of the respective parties on dissolution. The contract deals very particularly with these matters, as it is quite natural that it should in view of the fact that the "Hosiery Section" created by the contract was only one section or department in the "House" of David Costaguta & Company. It is not to be supposed that their general business was to be affected by the termination of the contract. In and by paragraphs 11 and 12 of the contract (Rec., pages 84, 85), which define the manner in which the contract may be terminated and how the interests of the respective parties shall be ascertained, the plaintiff surrenders any claim to receive any portion of the assets of the partnership as such or of the proceeds of such assets, agreeing that whatever is found to be eventually due to him upon liquidation, shall be paid to him in instalments falling due at certain stated times. On this point Judge Hand said as follows (Rec., pages 224. 225):

"My reason for thinking that they (David Costaguta & Co.) did have immediate posses-

sion is that both Articles Eleven and Twelve show that they were eventually in any case to get the whole 'business,' and that in so far as the business involved anything but 'merchandise' in the nature of things, they became owners at once. This is because they were not to divide the surplus with De Rees in specie, but under both articles it was to be treated as theirs, and they became indebted to him for his final share, payable in installments with interest. That effectively precludes any division. Now as they were not to divide the proceeds it would be an unexpected purpose which should contemplate his having joint possession of merchandise pending its sale, whose proceeds he was not to share. Moreover, under Article Twelve, David Costaguta & Company were to have ownership and possession at once; yet the only difference between the two articles is that under Article Twelve the merchandise was to be taken at its book value, while under Article Eleven it was to be sold. I do not readily perceive why that single difference should have given De Rees an intermediate joint possession until the value was ascertained in this alternative way. The argument drawn from the phrase, 'common accord,' is not valid; it refers only to the striking of an account between the parties."

POINT III.

Lastly, the appeal should be dismissed and the decrees affirmed.

WALTER H. MERRITT,
Solicitor for non-resident defendants David Costaguta, Marcos A. Algiers, Alejandro Sassoli, Eugenio Ottolenghi, individually and as co-partners in the business of David Costaguta & Company, appearing specially herein.

A. DELAFIELD SMITH,
Solicitor for resident defendants, Renado Taffell, and the American-European Trading Corporation, appearing specially herein.